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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Brief of Appellant

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BRIEF OF APPELLANT

Appellant, Michigan National Bank, a banking association organized under the laws of the United States, appealed from the judgment of the Supreme Court of the State of Michigan entered on February 25, 1960, affirming a judgment for appellees by the Court of Claims for the State of Michigan.

The judgment sustains a state tax on national bank shares, which appellant contends is discriminatory, is at "a greater rate" than the tax upon other money capital invested in shares of savings and loan associations, which compete with substantial phases of the business of national banks and is violative of R.S. 5219.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported in 358 Mich. 611; 101 N W 2d 245 (R. 1335). The opinion of Judge Searl, of the Michigan Court of Claims, is not reported, but is set forth in the Record R. 60a - 112a.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on February 25, 1960 (R. 1360). The appellant's claim of direct appeal was filed on June 17, 1960, and probable jurisdiction was noted by this Court on October 10, 1960. The jurisdiction to review this decision by direct appeal is conferred by Title 28, U. S. Code, Sec. 1257(2). *First National Bank* v. *Hartford*, 273 U.S. 548, 550, 71 L. Ed. 767; *Merchants' National Bank* v. *Richmond*, 256 U.S. 635, 637, 65 L. Ed. 1135; *First National Bank* v. *Anderson*, 269 U.S. 341, 346, 70 L. Ed. 295.

STATUTES INVOLVED

R.S. 5219

Revised Statutes of the United States 5219 (12 U.S.C., Section 548; 13 Stat. 111, as amended by 15 Stat. 34, 42 Stat. 1499, and 44 Stat. 223), hereinafter referred to as R. S. 5219. The following are the pertinent provisions thereof:

> "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States

may (1) **tax said shares*** or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with;

> 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others . . .
>
> (b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

The tax in this case is a tax on national bank shares. Since a tax on shares is "in lieu of the others" (Sec. 1(a)), the full text of the statute relating to the other three methods of taxation is not here set forth. The full text is set forth herein as Appendix A.

Michigan Tax on National Bank Shares
Act No. 9, Public Acts of Michigan, 1953

Act No. 9 of the Public Acts of Michigan for 1953 (Sec. 205.132a, C. L. Mich., 1948, 1953 Supp.; M. S. A. Sec. 7.556 (2a)), the tax here in question, is hereinafter referred to as Act 9. Act 9 was an amendment to the general Michigan Intangibles Tax law. The following are the pertinent provisions thereof;

> "For the calendar year 1952 . . . and for each year thereafter, or a portion thereof, there is hereby levied

*Emphasis throughout is that of appellant.

upon each resident or nonresident owner of shares of stock of national banking associations located in this state and banks and trust companies organized under the laws of this state, and there shall be collected from each such owner an annual specific tax on the privilege of ownership of each such share of stock, whether or not it is income producing, equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association, bank or trust company represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share."

The full text of Act 9 is set forth herein as Appendix B.

Michigan Taxes on Savings and Loan Associations and their Shares

C. L. '48, Sec. 205.132; M.S.A. Sec. 7.556(2) requires that federal and state savings and loan associations on behalf of their shareholders pay an intangibles tax of only 1/25 of 1% (⅘ mill) on the paid-in value of their shares. This is the same intangibles tax law which was amended by Act 9, above, in respect to bank shares.

C. L. '48, Sec. 450.304a; M.S.A. Sec. 21.206 requires that state savings and loan associations (but not federal associations) pay an additional privilege tax of ¼ mill on the association's capital and legal reserves.

The total statutory tax picture in Michigan as relates to taxes upon national bank shares and savings and loan associations and shares thereof is set forth on pages 47-49 *infra*.

QUESTIONS PRESENTED

Broadly stated, the question is:

1. Is Act 9 of the State of Michigan repugnant to R.S. 5219 in that Act 9 taxes national bank shares at a rate 8 (or more) times greater than "other moneyed capital in the

hands of individual citizens" consisting of shares in state and federal savings and loan associations, which, privately managed and operated for profit, are in direct competition with a substantial phase of the national banking business, to wit, the business of making residential mortgage loans to the public in the same localities, and such moneyed capital is more than 3 times as large as the total capitalization of all national banks in Michigan?

More particularly, with reference to the Michigan Supreme Court's opinion, the questions are:

2. Are savings and loan associations in Michigan which employ large amounts of moneyed capital in direct competition with a substantial phase of the business of national banks, precluded from "coming into competition with the business of national banks" under R. S. 5219, merely because their "character, purpose and organization" are different from national banks and by statute they may not do "a banking business," or "accept deposits"?

3. Under R. S. 5219, is it proper to ignore the fact that Act 9 is a tax upon national bank shares (assets of the bank less liabilities)—at a rate 8 (or more) times greater than is assessed upon other competing moneyed capital—and instead to substitute a different test of discrimination, to wit, comparing the ratio of tax dollars paid to total assets of the respective institutions, without deducting liabilities, thus treating the tax as though it were upon assets—instead of upon shares—of national banks, which is not authorized under R. S. 5219?

4. Notwithstanding that R. S. 5219 was enacted "to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation," may a state, under a claimed doctrine of "partial exemption," nevertheless discriminate against shares of national banks in favor of other moneyed capital invested by the general public, for profit, in shares of savings and loan associations,

when such associations, privately managed and operating for profit, employ such moneyed capital (three times the capitalization of all national banks in Michigan) in direct competition with a substantial phase of the business of national banks?

STATEMENT OF THE CASE

Act 9 (Public Acts of Michigan, 1953), which amended the Michigan Intangibles Tax and for the year 1952 and hereafter, taxed shares of national banks at a rate approximately eight times greater than that imposed upon moneyed capital invested in shares of domestic savings and loans associations, and thirteen times greater than upon moneyed capital invested in shares of federal associations. See *infra*, pp. 47-49.

The Michigan Supreme Court recognized that (358 Mich. 611, 614):

> "In 1953 (PA 1953, No. 9) the [Michigan] legislature amended the intangibles tax law so as to **place** both State and **national banks** in a **special and more heavily taxed category,** imposing a **tax on bank shares** at the rate of 5½ mills ($5.50 per $1,000) 'on the privilege of ownership of each * * * share of stock' based on the 'capital account' of each bank."

In singling out bank shares, the legislature left untouched the much lower rate of intangibles tax ($.40 (40 cents) per $1,000)* imposed on savings and loan associations and their shareholders. The undisputed facts show that these associations represented large and increasing aggregations of moneyed capital invested by the general public for profit, which was, and is, employed in direct and keen competition with a substantial phase of the national banking business in Michi-

*In addition, state savings and loan associations are subject to a privilege tax of $.25 (25 cents) per $1,000. Since neither national banks nor federal savings and loan associations obtain their privilege of doing business from the State of Michigan, they were not subject to this tax. See footnote 41, *infra* p. 48.

gan, i.e., the residential mortgage loan business. In the tax year in question (1952) moneyed capital invested in shares of savings and loan associations in Michigan exceeded $468,000,000 (Exhibit 221; R. 1284a), which has more than trebled in the last seven and one-half years and at the present time exceeds $1,600,000,000.[1]

Appellant contends that this moneyed capital enjoys a distinct competitive advantage because of its greatly favored tax treatment by the State of Michigan; and that the owners of national bank shares—and national banks competing with savings and loan associations—are thereby clearly being discriminated against to their serious detriment.

Such discrimination, we submit, is contrary to and in violation of R. S. 5219 which was enacted by Congress for the purpose of safeguarding national banks, and precluding tax discrimination by states favoring local moneyed capital, so as to secure the integrity of national bank capital and assure national banks and the owners of the shares thereof that states would not hamper or destroy national banks by such discriminatory taxes.

Appellant, Michigan National Bank, has banking offices in the following cities in Michigan: Lansing, Battle Creek, Flint, Grand Rapids, Marshall, Port Huron, and Saginaw, in all of which cities appellant is in sharp competition with savings and loan associations in the residential mortgage business. In each of the cities where appellant bank did business, the full impact of that competition was felt.

Prior to the passage of Act 9, appellant paid without protest for the year 1952 a tax of $18,500 on its shares and $100,318.24 on its deposits. Act 9 imposed an additional tax of $49,929.27 on appellant's shares, which amount appellant paid under protest on behalf of its shareholders, and

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[1]Monthly Report of Federal Home Loan Bank Board.

for which amount appellant commenced this suit, alleging the federal question here involved, i.e., that Act 9 is violative of R. S. 5219.[2]

Appellant's position throughout this litigation has been that:

> "This is **not a case of tax avoidance or** claimed **immunity** by appellant. * * * The singularly important and impelling **object of this case is to assure tax equality with competitors.** The powerful and rapidly growing savings and loan associations (or their shareholders) should be taxed at the same rate as shares in national banks in Michigan, as required under RS §5219—regardless of what that rate may be."[3]

See Michigan Supreme Court Opinion, 358 Mich. 611, 618; R. 1338.

States are prohibited from imposing discriminatory taxes against national banks or their shares.

A state is without power to tax national bank shares,

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[2]Appellant has commenced like actions to recover taxes paid under protest for subsequent years (1953-1959) and has claims in the aggregate amount of $729,509.71 — of which amount $541,822.21 is the excess due to Act 9 over the previous intangibles tax on bank shares.

Other national banks in Michigan intervened, namely: Commercial National Bank at Iron Mountain; National Bank of Jackson; First National Bank and Trust Company of Kalamazoo; First National Bank at Three Rivers; and National Bank of Wyandotte. The intervenors' actions were held in abeyance pending the outcome of this appeal.

In addition, the following national banks in Michigan sought to intervene as parties plaintiff, but were denied that opportunity: Community National Bank of Pontiac, The Commercial National Bank of Ithaca, First National Bank of Holland.

[3]If savings and loan association shares were taxed at the same rate as shares in national banks in Michigan, the State of Michigan would receive an additional Six Million Dollars or more in revenue annually.

except as Congress consents and then only in conformity with the restrictions attached to its consent. See *infra*, p. 28.

As relates to a state "tax on shares" of national banks, which is here involved, Congress by R. S. 5219 Sec. 1(b) has safeguarded national bank shares from discriminatory state taxation by providing that the tax

> "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks."[4]

Money Invested in Savings and Loan Associations is "Other Moneyed Capital."

The money invested for profit, in shares of savings and loan associations, and employed by such associations, for profit, in making loans secured by residential and other real estate mortgages is clearly "other moneyed capital" within the meaning of R. S. 5219. See *infra*, p. 29.

National Bank Shares are Taxed at a "Greater Rate" than Other Moneyed Capital.

Act 9 placed bank shares in "a special and more heavily taxed category" (358 Mich. 611, 614) taxing such shares at a "greater rate," 8 or more times the rate imposed on savings and loan associations and their shares. See *infra*, pp. 47-49.

The Moneyed Capital Invested in Savings and Loan Associations "Coming into Competition with the Business of National Banks" is Substantial.

The record in this case is replete with undisputed proof showing the fact of actual and direct competition between national banks and savings and loan associations in Michigan. Both institutions were actively and substantially engaged during the tax year in question, and to date, in seeking and securing in the same localities throughout the State in-

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[4] A state tax "on shares" is "in lieu of" the other three methods of state taxation on national banks or their shares permitted under the statute. See R. S. 5219, Sec. 1(a).

vestments of the same class, i.e., residential mortgage loans. It further appears without question that this business, insofar as national banks and appellant were and are concerned, represented a substantial phase of their business.

(a) In the tax year in question (1952), and to date, both national banks and savings and loan associations were privately managed financial institutions, operating for a profit in the same localities in Michigan, each making comparable residential mortgage and home improvement loans to the general public.

(b) In 1952 appellant national bank held $60,000,000 of residential real estate loans[5], $18,551,000 of which (2,728 in number) were made by appellant bank during 1952.[6] This compares with $97,000,000 of such loans held by savings and loan associations located in cities where appellant bank operated,[7] $35,000,000 of which loans (6,498 in number) were made during 1952.[8]

(c) The residential mortgage business was, and is, a substantial phase of the business of appellant national bank, amounting in 1952 to 40% of its total loans and discounts,[9] 20% of its total assets,[10] and from which it derived 26% of its total income.[11]

(d) In 1952 all national banks in Michigan held $301,000,000 of such residential real estate loans,[12] which amounted to 30% of their total loans and discounts, as compared to $433,000,000 of such loans held by all savings and loan associations in Michigan.[13]

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[5]Exhibit 3, R. 934a.

[6]Exhibit 5H, R. 959a.

[7]See Chart, infra, p. 17, and Exhibits therein noted.

[8]Exhibit 65A, R. 1021a.

[9]Exhibit 3, R. 934a.

[10]Exhibit 3, R. 931a.

[11]Exhibit 205, R. 1266a.

[12]Exhibit 103, R. 1252a.

[13]Exhibit 6, R. 960a.

The Michigan Supreme Court recognized that appellant "introduced proof that the loaning of money on the basis of mortgages secured by residential real estate, was a **substantial phase of its business,**" and the Court summarized such proof (358 Mich. 611, 617).

Class of Borrower from Both Institutions is the Same.

Appellant bank's officers and competing savings and loan associations' officers testified that all economic and income groups comprised their residential mortgage borrowers. Both solicited business from the public at large in the same localities in which they both did business. Neither loaned to any particular class of borrowers; rather "to all classes of people in the community" (R. 207a, 629a, 640a, 647a); "the run of the mine, as they came," (Mr. Nelligan, Vice President, Michigan National Bank, R. 619a); "across the board to all classes of people," (Mr. Pheiffer, Executive Vice President, Saginaw Savings & Loan, R. 377a).

Both institutions sought mortgage business from the public generally—professional people, business men, builders, teachers, salaried employees (executive and otherwise), as well as laboring people.[14] It was admitted without qualification by association witnesses that their institutions loaned to the same class of borrowers as did appellant bank (R. 204a, 377a, 291a, 480a). Savings and loan associations, like appellant bank, considered only two factors in determining whether to make a residential mortgage loan. These factors were the person's ability to repay the loan (his credit rating) and the value of his property.[15]

Class of Property on which Banks and Savings and Loan Associations Loan Money is Similar.

Not only did both national banks and savings and loan

[14]R. 207a, 254a, 303a, 436a, 480a, 607a, 619a, 629a, 640a, 647a; Exhibit 77, p. 15, R. 1138a.

[15]R. 171a, 257a, 258a, 347a, 388a, 436a; Exhibit 73, p. 32; Exhibit 77, p. 11, R. 1136a.

associations solicit the same customers in the same locality, but both institutions relied upon the same type of property to secure their loans, i.e., similar and often identical residential real estate located in the same areas in which they did business (R. 291a, 204a). A substantial number of random examples of loans were offered in evidence, showing that Michigan National Bank or a competing association obtained a mortgage on a certain residence, and thereafter the same residence was later refinanced by the other institution.[16]

Terms of Mortgage Loans and Mortgages are Comparable.

The terms and conditions of real estate loans and mortgages made by appellant bank and savings and loan associations were identical or substantially the same.

Thus, in 1952, appellant made over $18,550,000 worth of residential loans secured by F.H.A. ($10,869,000), V. A. ($456,000) and Conventional ($7,245,000) mortgages.[17] (Exhibit 5H, R. 959a.) During 1952, savings and loan associations, in the same localities as appellant, were also making residential mortgage loans on the security of F.H.A. and V.A. mortgages ($6,273,000) and Conventional mortgages ($26,058,000) (Exhibit 200C, R. 1261a).

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[16]R. 205a, 212a, 275a, 291a, 349a, 1079a, 1141a. Sixty-nine examples of refinancing of mortgages by appellant bank of savings and loan association mortgages, and conversely, by savings and loan associations of bank mortgages, were introduced at the trial. Exhibit 102A-11; R. 1244a-49a is an example of such refinancing. To avoid unnecessary duplication the other 68 examples of refinancing in each community in which appellant bank operates, which were introduced at the trial, have not been printed nor have photographs of the residences involved been reproduced in this Record.

[17]F. H. A. and V. A. mortgage loans are insured by the United States, and for that reason their terms and conditions, strictly controlled by the federal government, were identical—whether the loan be made by a savings and loan association, a national

(Continued on next page)

Each type of mortgage competed one with the other for the favor and needs of the borrower (and the lender). Because F.H.A. and V.A. mortgages were guaranteed by the Government, they carried lower interest rates than Conventional mortgages (4% to 4¼% vs. 5% to 6%), were for a longer average term than Conventional mortgages (20 to 25 years vs. 10 to 12 years), and were larger in amount (85% to 100% of appraisal value vs. 50% to 60% of appraisal value). On the other hand, F.H.A. and V.A. loans required more time for approval and closing than Conventional loans (R. 485a, 565a). In 1952 both appellant bank and savings and loan associations were making the same type or types of loan (R. 959a, 1261a). It was common practice for a borrower to finance his residence by use of one type of mortgage from one financing institution, and, subsequently, for the same borrower (or a purchaser from him) to refinance the loan with a competing institution using another type of mortgage.[18]

The terms and conditions of F.H.A. and V.A. loans were identical. Identical forms provided by the Government were used by both appellant bank and savings and loan associations.[19] The maximum interest rate, service and insurance

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(Continued from page 12)

bank, or any other financial institution or individual. Conventional mortgage loans are those other than loans insured by the Federal Government, normally made by the particular institution. They were generally similar in form and substance to other mortgages made by other lending institutions and persons engaged in the business of loaning money on the security of residential real estate loans.

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[18] (Flint: Exhibits 102A1-102A17; R. 1236a-1249a). As stated in footnote 14, all other 68 examples, similar to Exhibit 102A, were omitted from this record for brevity. Battle Creek: 102B1-102B11; Grand Rapids: 102C1-102C10; Lansing: 102D1-102D12; Marshall: 102E1; Port Huron: 102F1-102F12; Saginaw 102G2-102G8.

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[19] Examples of these forms, as used by the Michigan National Bank, are contained in the Exhibit 101 series, R. 1217a-1235a.

charge fixed by law were obtained by appellant and savings and loan associations.[20] In practice, both appellant bank and savings and loan associations granted F.H.A. and V.A. mortgages for about twenty years[21] and they both granted the maximum ratio of loans to appraised value, as fixed by law.[22]

The terms and conditions of Conventional mortgage loans were also comparable and competitive. In each community where appellant did business, both appellant and the savings and loan association or associations there located charged comparable interest rates,[23] made mortgage loans in the same comparable ratio to the value of the property mortgages,[24] made mortgage loans substantially comparable as to term of years,[25] and received mortgages with comparable rights and liabilities (R. 326a).

Virtually all of appellant's residential mortgage loans as well as those of savings and loan associations involved the loaning of new money, rather than the giving of a mortgage to secure a pre-existing indebtedness (R. 613a, 614a, 619a, 636a, 640a, 647a) and were amortized on a monthly basis (R. 432a, 547a, 566a, 613a, 614a, 617a, 628a, 647a).

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[20]R. 221a, 432a, 488a, 547a, 564a, 599a, 609a, 618a, 638a, 646a, 1074a, 1152a.

[21]R. 398a, 488a, 546a, 563a, 606a, 609a, 618a, 627a, 639a, 646a.

[22]R. 567a, 606-7a, 609a, 618a, 639a.

[23]R. 219a, 221a, 259a, 289a, 300a, 381a, 430a, 487a, 488a, 511a, 546-547a, 562a, 564a, 605a, 617a, 618a, 627a, 637a, 646a, 1053a, 1112a, 1142a, 1179a.

[24]R. 566a, 567a, 606a, 607a, 609a, 617a, 618a, 627a, 639a, 646a, 1157a; Exhibit 106, R. 1255a; Exhibit 107, R. 1256a; Exhibit 108, R. 1257a.

[25]R. 488a, 546a, 590a, 606a, 609a, 617a, 618a, 627a, 638a, 639a, 646a; Exhibits 106, R. 1255a; 107, R. 1256a; and 108, R. 1257a.

The officers of savings and loan associations and of appellant bank acknowledged that the bank and the associations were each others principal competitor for residential mortgage loan business.[26]

The unqualified admission by the managing officers of the savings and loan associations was that appellant national bank was and is their principal competitor in the residential mortgage loan business in the localities where each operated. Similarly, the testimony of officers of appellant bank was that the savings and loan associations were its principal competitors for such mortgage loan business.[27]

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[26]R. 108-109a, 203-204a, 259-260a, 291a, 384a, 439a, 479a, 515a, 576a, 601-602a, 611a, 619-620a, 629a, 648a.

[27]Notwithstanding these unequivocal admissions by officers of the savings and loan associations as to competition (see footnote 26), counsel for appellee, State of Michigan, has intimated that such competition was not so substantial. Appellee's suggestion that only 6.5% of the associations' conventional loans were within both of the then statutory limitations on the banks' conventional loans in 1952, i.e. 60% or less of assessed value and 10 years or less (Exhibit 200, R. 1258a) does not truly or fairly reflect the overall competitive picture.

What appellee fails to acknowledge is that the average conventional loan of appellant bank was 60% of appraised value and for a 10 year term, whereas the average loan of the associations was for a somewhat lesser amount (54% to 59% of appraised value) though for a slightly longer term—11 years. (Exhibits 106, 107 and 108, R. 1255-7a). Moreover, appellant bank could (and sometimes did) permit payments on a lower monthly basis so long as at least 40% of the loan was amortized over 10 years, and at the expiration of 10 years renew the loan for another period not to exceed 10 years. The practical result of this procedure was for the bank to create a conventional loan for a term as great as 20 years (R. 573a, 590-592a; Eg., see Exhibit 101 A5, R. 1225a-9a).

We submit that this minor and unimportant difference did not affect the keen competition between these two financial institutions in this one type of mortgage loan—conventional mortgages. Much less does it affect the competition in the general home

(Continued on next page)

The Competition is Extensive and Substantial.

Nationally, all savings and loan associations in 1952 held $18,336,000,000 (Exs. 10 and 14; R. 966a and 972a), or over 30.2% of the total mortgage debt in the United States of $58,500,000,000 (Ex. 10, R. 965a). By the end of 1959 savings and loan associations held over $49,727,000,000, or in excess of 38% of total national mortgage debt of $131,144,000,000. (United Savings and Loan Fact Book, 1960; based upon Federal Home Loan Bank Board Reports.)

The extent and substantiality of the competition between national banks (including appellant) and savings and loan associations for the residential mortgage business is graphically illustrated by the chart on the following page, showing the holdings of each.

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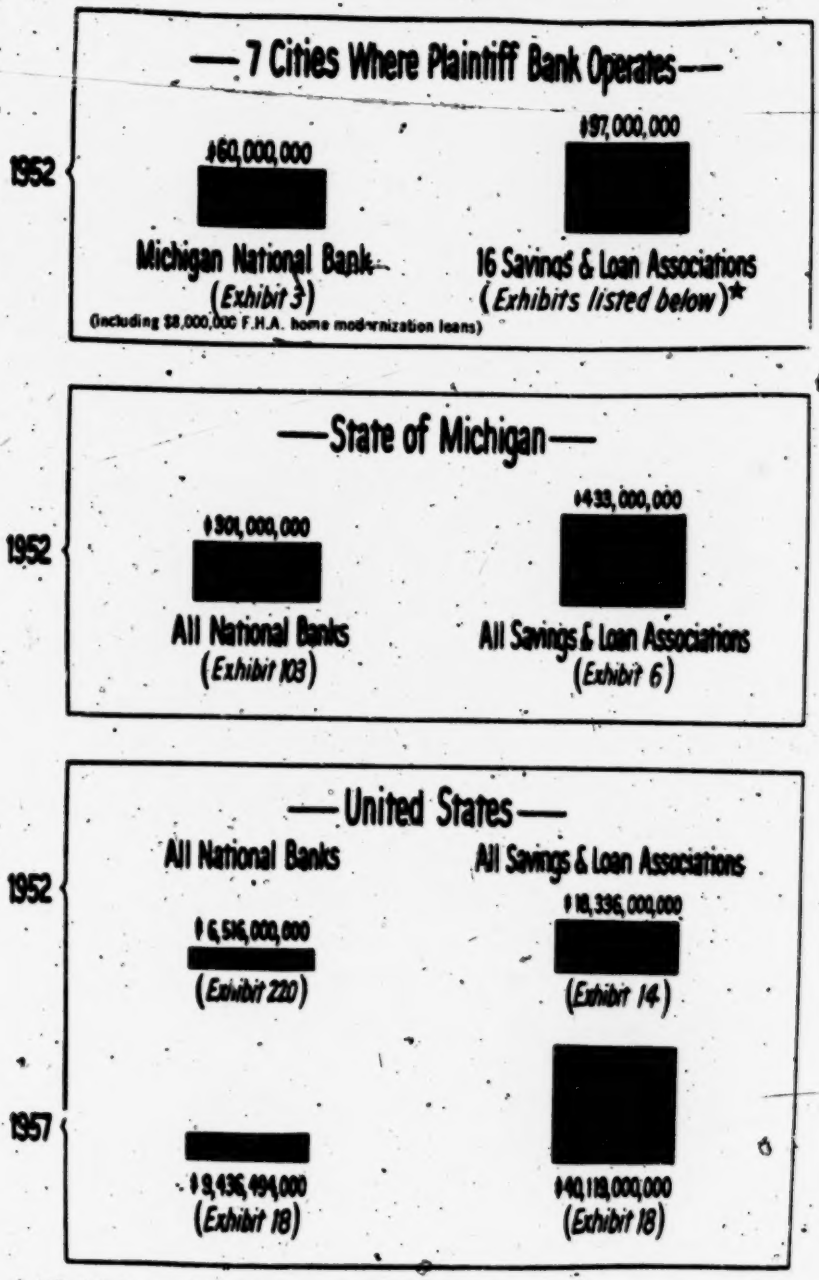
mortgage loan market, i.e. between all types of—F.H.A., V.A., and Conventional—mortgage loans. The testimony of the officers of the associations and of appellant bank clearly shows that they deemed the mortgage loan business of their respective institutions to be highly competitive.

Residential Mortgage Business



★(Exhibits: 36A, 36C, 36E, 36E, 36G, 36I, 36J, 45F, 57F, 61F, 73E, 77E, 81E, 87, 92.)

Because appellee and the court below relied upon early cases, decided at a time when national banks had no power to engage in the mortgage business and, therefore, legally could not and did not compete with savings and loan associations—which clearly is not the case today—the following undisputed facts showing the decided change in this situation are set forth.

The Keen Competition for Mortgage Business of the Present Day is quite different from the Time when National Banks had no Legal Power to Engage in this Business.

The area of competition with which we are here concerned, i.e., the residential mortgage market, is a relatively new one for national banks.

National banks could not make loans on real estate mortgages until the Act of December 23, 1913, c. 6 §24, 38 Stat. 251, 273, nor were they authorized to take savings deposits until the Act of February 25, 1927, 44 Stat. 1232.[27A] Under the 1913 Act, national banks were permitted to make mortgage loans on farm property only.

Congress since 1913 has continuously broadened the power of national banks to engage in the mortgage loan business, including loans on residences, until today the power of national banks to make residential mortgage loans is substantially the same as that of savings and loan associations.

An historical review of Section 24, Federal Reserve Act (12 U. S. C. 371), as amended (which prescribed the authority of national banks to make loans secured by real estate), reveals that prior to 1916, national banks were not authorized to loan money on the security of real estate, with the exception of certain farm land. By Act of September 7, 1916, (39 Stat. 754) the first grant of authority by Congress to

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[27A] The 1913 Act permitted national banks to take "time deposits". However, it was not until the 1927 Act that national banks were expressly authorized by Congress to take "savings deposits".

loan on residential real estate was made to national banks This enabled national banks to loan money on the security of improved real estate to the extent of 50% of actual value for a term of no longer than one year. With the exception of the Act of February 25, 1927, (44 Stat. 1232) which extended the term of said mortgages to no longer than five years, no material change was made in the national banks' authority to loan on the security of residential mortgages until 1934.

In 1934 (Act of June 27, 1934, 48 Stat. 1263), national banks were permitted to make mortgage loans under Title II, National Housing Act (12 U.S.C. 1701 et seq.), commonly described as F.H.A. mortgages. By Act of August 23, 1935 (49 Stat. 706), amending Sec. 24 of the Federal Reserve Act, national banks were authorized to make conventional residential mortgage loans in the amount of 60% of the appraised value of the property for a term of ten years if 40% of the mortgage principal were amortized within ten years. By Comptroller General's decision of 1944, national banks became participants in the V.A. (or G.I.) home loan program National banks were authorized to make Title I, F.H.A. home improvement loans by the 1950 Amendment to Section 24, Federal Reserve Act (64 Stat. 80). Accordingly, in 1952, national banks were authorized to make F.H.A. mortgage loans and home modernization loans, and V.A. mortgage loans identical to those made by savings and loan associations, and conventional mortgage loans comparable to those made by such associations.[28]

As the undisputed facts hereinabove set forth show, the broadened authority granted by Congress to compete in the mortgage business was actively exercised by the banks in 1952 as an important part of their business. As previously

[28]Since 1955—in addition to F.H.A. and V.A. mortgage loans—national banks, through amendments to Section 24, Federal Reserve Act, have been authorized to make conventional mortgage loans in the amount of two-thirds of the assessed value of the property for a term of twenty years, provided the principal is fully amortized within twenty years.

noted, *supra*, p. 17, the volume of competing residential mortgage business in Michigan and throughout the United States was most substantial. In 1952 residential mortgage loans of appellant bank amounted to 40% of its total loans and discounts, produced 26% of its income, and constituted 20% of its assets, and such business accounted for 30% of the total loans and discounts of all national banks in Michigan, *supra*, p. 10.

Since the Early Days, there have been Substantial Changes in Character, Method, Manner and Scope of Operations of Savings and Loan Associations.

Not only do appellee and the court below rely upon early cases when national banks could not and did not compete, but at such time savings and loan associations were substantially different in character and in their method, manner and scope of operation from the large, commercially operated, profit-making, savings and loan associations of the present day.

Relying upon the early cases, appellee contended and the court below held that the capital invested in the modern associations could be "partially exempted" (preferred taxwise*) by the State of Michigan without violating R. S. 5219.

Appellant contends that R. S. 5219 is violated whenever moneyed capital, employed in a business for profit in substantial competition with a substantial phase of the business of national banks, is taxed at a lower rate than shares of national banks. Moreover, we submit that the argument of appellee and the conclusion of the lower court that a state may "partially exempt" (prefer taxwise) moneyed capital invested in shares of savings and loan associations for "just cause" without violating R. S. 5219 cannot be sustained in the face of the undisputed facts in this case.

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*None of these shares are exempt from tax—they are merely taxed at a lower or preferred rate. Appellant submits that a difference in rate is a discrimination.

In the early days savings and loan associations were small organizations of "poor people," who banded together in small local or neighborhood groups, investing part of their weekly wages to provide funds to enable one another to build small homes. These organizations were quasi-charitable in nature, were operated mutually for the benefit of their closely knit group of members, only loaned to their members and not to the public, and were not operated for a profit in the commercial sense.

There has been a basic change in the character of these organizations and a significant difference in the method, manner and scope of their operations. Savings and loan associations today are big, powerful, financial institutions. They no longer obtain funds from small local or neighborhood groups of "poor people," but extensively advertise for and solicit investments in their shares from the public at large, to obtain the largest possible public participation by investors from all economic and income groups, rich, middle class, and wage earners, corporations, partnerships, trusts, pension funds and others. They no longer are mutual in character and operation. These investors invest their money in a corporation engaged primarily in the business of making residential mortgage loans to non-investors (the public at large) at the highest rates competition will permit, with little concern for the needs and requirements of borrowers of such mortgage funds. Such investor shareholders seek high returns and operate these associations in a commercial sense for the highest profit obtainable, consistent with reasonable safety.

In loaning funds secured by residential mortgages, these associations also publicly advertise, soliciting loans from the general public in every economic strata—not merely from their investors. In fact, mortgage borrowers from present day associations are not members when their business is sought (with few exceptions), do not become members until

the loan is made, and cease being members when the loan is paid. Nor do such borrowing members participate in profits or losses.

Although the shares of Michigan savings and loan associations were originally exempt by statute from State taxation,[29] in 1939 and thereafter they were (and are) subjected to State taxation.[30] Under Act 9 of 1953 the rate on national bank shares was greatly increased, whereas the tax rate on shares in savings and loan associations was not increased. The present substantial difference in rate ($5.50 per $1000 vs. $.40 (40 cents) per $1000), appellee and the court below characterized as "partial exemption." None of these shares are exempt from such tax—they are merely taxed at a lower or preferred rate.

Whether or not Michigan savings and loan associations, themselves, were ever subject to state franchise taxes prior to 1921, does not appear. However, it is clear that since 1921 state associations have been subject to such franchise taxes.[31] Neither Federal savings and loan associations nor national banks were subject to such state franchise tax, because both are granted the privilege of doing business by the Federal Government, and not by the state.

In 1951, because of the basic change in the character and manner and scope of their operations, the Congress of the United States concluded that there no longer was any valid basis to exempt savings and loan associations from Federal

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[29]Act 50, Public Acts of Michigan, 1887, Section 17.

[30]Intangibles tax on shares of savings and loan associations: Act 301, Public Acts of Michigan, 1939, Section 2; amended by Act 233, Public Acts 1941; Act 165, Public Acts 1945; and Act 9, Public Acts 1953, Section 2a.

[31]Act 85, Public Acts 1921 of Michigan; Act 233, Public Acts 1923; Act 33, Public Acts 1927; Act 140, Public Acts 1927; Act 154, Public Acts 1945; Act 183, Public Acts 1952.

corporate income taxes, recognizing (Senate Finance Committee Report, 82nd Congress, 1st Session, S. Rept. 781):

"In the early days of these institutions, the transactions of the associations were confined to members, and no one could participate in the benefits they afforded without becoming a shareholder. Individuals became investing members of these organizations in the expectation of ultimately becoming borrowing members as well. Membership implied not only regular payments to the association for a considerable period of time, but also risk of losses. Members could not cancel their memberships or withdraw their shares before maturity without incurring heavy penalties. The fact that the members were both the borrowers and the lenders was the essence of the 'mutuality' of these organizations.

"Although many of the old forms have been preserved to the present day, few of the associations have retained the substance of their earlier mutuality . . . borrowing members find dealing with a savings and loan association only technically different from dealing with other mortgage lending institutions in which the lending group is distinct from the borrowing group. . . .

". . . since savings and loan associations are no longer self-contained cooperative institutions as they were when originally organized there is relatively little difference between their operations and those of other financial institutions which accept deposits and make real-estate loans."

The undisputed facts (and record references) showing

(a) basic and significant changes in the character, method, manner and scope of operation of savings and loan associations since their inception in Michigan in 1887 and nationally, and

(b) the tremendous growth, size and power of present-day associations[32]

are set forth in connection with our argument that under R. S. 5219 the State of Michigan is without power to "partially exempt" or prefer taxwise moneyed capital invested in savings and loan associations and there is no "just cause" for it so to do. See *infra*, p. 65 *et seq.*

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[32] Savings and loan associations "are making home loans [nationally] . . . totalling more than $14 billion dollars annually . . . **more than all other financial institutions combined,**" according to a two page advertisement of The Savings and Loan Foundation, appearing in U. S. News & World Report, October 17, 1960, pp. 32-33.

SUMMARY OF ARGUMENT

The compelling object and purpose of this action is to assure equality of taxation in the State of Michigan to national banks and their shareholders with their principal competitors in the residential mortgage loan business (which business constitutes a substantial phase of the business of national banks).

Since 1952 the State of Michigan has subjected shares of national banks to a tax at a rate 8 to 13 times greater than that imposed upon shares of savings and loan associations (including that imposed upon the associations themselves)—clearly discriminatory and contrary to R.S. 5219.

Modern savings and loan associations, employing huge aggregations of capital (presently in excess of $1,600,000,000 in Michigan; $55,000,000,000 in the United States), are formidable and dominating competitors of national banks in the mortgage lending phase of the banks' business. Such mortgage business of national banks (and appellant bank) is substantial and is an "important and sizable" part of their business (40% of all loans and discounts). Such mortgage business produces a large amount of the banks' income (in excess of 26%) and is vital to the continued strength and vitality of national banks.

Appellant national bank does not here seek to avoid taxation or to obtain tax immunity. It merely seeks not to be placed at a distinct competitive disadvantage because of tax discrimination forbidden by R.S. 5219—which by Congressional mandate directs that the State in taxing shares of national banks shall not tax them ". . . . at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks . . ."

I.

R. S. 5219, since its original enactment in 1868, has been the sole grant of power to the states to tax national bank shares. A state may tax only in accordance with its conditions. *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S., 341, 347; 70 L.Ed. 295; *Des Moines National Bank* v. *Fairweather*, 263 U.S., 103, 106; 68 L.Ed. 191. Its purpose through the years has been to protect, as agencies of the United States, national banks and their shareholders from the very sort of discrimination which has been practiced in this case.[a]

Under the following principles announced by this Court, R. S. 5219 has been violated in the case at bar:

1. The rate of tax on national bank shares is substantially greater than that assessed against savings and loan associations and their shareholders.

2. The money invested in shares of such associations represents "other moneyed capital" within the terms of R. S. 5219. This capital employed in carrying the association's business is money, which is invested and reinvested in the mortgage business for profit and is clearly within the definition of "moneyed capital" under R. S. 5219. *Mercantile Bank* v. *New York*, 121 U.S. 138; 157; 30 L.Ed. 895.

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[a]The discrimination here resulted from placing national bank shares in a special, heavily taxed category, while savings and loan shares and other intangibles were left to be taxed at the old and much lower rate. Appellant's tax (alone) on its shares thereby were increased in excess of one-half million dollars during the past six years. More importantly, the rate of tax imposed on bank shares has been 8 to 13 times the rate assessed against savings and loan associations and their shareholders. Further intensifying this discrimination is a statutory undervaluation of the asociations' shares in relation to bank shares.

Amendment to Michigan Intangible Tax Law, by Act 9 of the Public Acts of 1953, relating applicable to 1952 and thereafter.

3. The share capital of such associations in Michigan (presently in excess of $1,600,000,000) is substantial when compared to the capitalization of all national banks in Michigan. *First National Bank of Hartford* v. *City of Hartford*, 273 U.S. 548, 558; 71 L. Ed. 767.

4. The capital of such associations is employed in the same sort of transactions (residential mortgage loans) as those in which national banks engage and in the same localities in which they do business. *Hartford, supra*, p. 558.

5. There is keen and substantial competition between national banks and savings and loan asociations in Michigan (and throughout the United States) for the residential mortgage business supra, pp. 9-17. This mortgage business constitutes a vital and substantial phase of the business of the banks. *Hartford, supra; Minnesota* v. *First National Bank*, 273 U.S. 561, 567.

II.

The Michigan Supreme Court made three basic errors in its decision.

1.

The Michigan Court erred in holding that savings and loan associations as a matter of law cannot be in competition with the business of national banks because they are "different in character, purpose and organization from national banks," operate "in a narrow, restricted field," and are not permited to take deposits.

This proposition is in direct conflict with the decisions of this Court. This Court has held that "competition . . . arises **not from the character of the business** of those who compete but from the **manner of employment of the capital** at their command." *Hartford, supra*, p. 557. To hold otherwise would be to restrict R. S. 5219 to state banking associations, since

they are the only institutions permitted to take deposits and are the only institutions whose "character, purpose and organizations" are similar to a national bank. Such position has been consistently rejected by Congress and this Court, *Merchants National Bank of Richmond* v. *City of Richmond*, 256 U.S. 635; 65 L. Ed. 1135.

The lower court's reliance upon the so-called "narrow, restricted field" in which savings and loan asociations operate as compared with banks is also clearly erroneous. This Court has held that competition under R. S. 5219 exists, where the other "moneyed capital" (of savings and loan associations), substantial in amount, is employed "in **some** but **not all phases** of the business of national banks." *Hartford, supra*, p. 557; *Minnesota* v. *First National Bank*, 273 U.S. 561, 567.

Here it is undisputed that the residential mortgage loan business is a substantial and important part of the business of appellant and other national banks in Michigan. Such mortgage loans constitute 40% of all of appellant's loans and discounts; 30% of all national banks' loans and discounts; and more than 26% of appellant's total income is derived therefrom.

Clearly, R. S. 5219 is applicable where, as here, there is substantial competition with a substantial phase of the business of national banks.

2.

The Michigan Court erred in substituting a test of discrimination under R. S. 5219 expressly rejected by this Court —in effect substituting a different tax, not permitted a state in taxing national banks or their shares. Instead of a tax on bank shares (assets less liabilities), which the Michigan statute (Act 9) imposed, the Michigan court substituted a tax on total or gross assets (without deducting liabilities)—

and by this impermissible variance concluded that there is substantial tax equivalence. This method of comparison was expressly rejected by this Court (in *Minnesota,* supra, 273 U.S. at 564, *Des Moines* v. *Fairweather,* 263 U.S. 103) as ignoring R. S. 5219, which authorizes a tax on shares, not on gross assets without deducting liabilities.

Appellee asserts still another method of comparison, not adopted by the Michigan court, which would exclude as "other moneyed capital" the paid-in capital of the associations (presently $1,600,000,000) on the theory that shareholders are depositors. This proposition is erroneous. Investors in these associations, as a matter of law and in substance are shareholders, and are not depositors or creditors, *Michigan Savings and Loan League* v. *Municipal Finance Commission of Michigan,* 347 Mich. 311; 319; 76 N. W. 2d 590; and, even if they were depositors, such as in mutual savings banks, their interest in the association would be nonetheless "other moneyed capital," which must be taxed at no lesser or favored rate than shares of national banks. *Mercantile, supra,* 121, U.S., at p. 157.

3.

Lastly, the Michigan court, relying on early cases from a different era, erroneously concluded that the state had the right to partially exempt (prefer tax wise) these associations and their shareholders without violating the prohibitions of R. S. 5219. This conclusion is based upon two errors.

First, since the time of these early cases there has been a significant broadening of the powers of national banks, which made it possible for them to make mortgage loans on residential properties on the same basis as savings and loan associations. Today there is sharp and substantial competition between the two institutions—which formerly was non-existent.

It necessarily follows that cases involving the making by state institutions or others of mortgage loans or of accepting and investing savings deposits at a time when national banks did not have authority or were not exercising authority to do either are inapplicable to present day conditions.

Secondly, the modern savings and loan associations—unlike those of the early days—are no longer small, neighborhood organizations of "poor people," banded together to husband their weekly wages to provide funds to enable one another to build small homes. They are no longer mutual nor are they non-commercial, operated on a quasi-charitable basis as in the early days.

Today, these associations not only (a) are dominant competitors of national banks in the residential mortgage lending business, but (b) are large, powerful, rapidly growing financial institutions, operating commercially for a profit, seeking their investment share capital from the general public of all economic and income classes, not only of wage earners, but mostly from business men, professional people, corporations, partnerships, trusts, and pension funds. They no longer are mutual in operation. The interest of the investors is diametrically opposed to that of the borrowers.

Profit is the prime object and motive of the investors and of the associations.[b]

Favored taxwise, these associations have enjoyed a phenomenal growth and today advertise that they make "more residential mortgage loans than all other financial institu-

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[b]The character of Michigan savings and loan associations having changed from 1887 (when they were exempt from taxation) (Act 50 P. A. of 1887; M.S.A. 23.558), Michigan now taxes savings and loan associations and their shares but at a substantially lower rate than that imposed upon the shares of national banks.

tions combined." There clearly is no "just reason" why such associations or their shareholders should be entitled to tax preference as against national banks or their shares. R. S. 5219 expressly prohibits such tax discrimination against national banks and their shares.

If such tax discrimination by states against national banks and their shareholders be countenanced and continued, the competitive disadvantage to national banks is implicit. The results will be serious and far-reaching.

ARGUMENT

I.

UNDER THE CONTROLLING DECISIONS OF THIS COURT, ACT 9 IS INVALID AND IN CONFLICT WITH R. S. 5219.

States are prohibited from taxing national banks or their shares except as Congress permits.

Absent R. S. 5219, a state is without power to tax national bank shares. "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent." *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341, 347; 70 L. Ed. 295; *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103, 106; 68 L. Ed. 191; and cases cited.

R. S. 5219 prohibits a State from imposing discriminatory taxes against national banks or their shares.

As relates to a state "tax on shares" of national banks, which is here involved, Congress by R. S. 5219, Sec. 1 (b) has provided that the tax

> "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks."[33]

These limitations, as defined by this Court, are that the state tax on national bank shares—

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[33] A state tax "on shares" is "in lieu of" the other three methods of state taxation on national banks or their shares permitted under the statute. See R. S. 5219, Sec. 1(a).

1. "shall not be at a greater rate than is assessed upon other moneyed capital";

2. "coming into competition with [a substantial phase of] the business of national banks"; and

3. such competition is substantial when compared to the capitalization of national banks in the state.

The State of Michigan clearly failed to comply with these requirements in taxing national bank shares under Act 9.

1.

Shares in Savings and Loan Associations are "Other Moneyed Capital."

The money invested for profit in shares of savings and loan associations, and employed by such associations, for profit, in making loans secured by residential and other real estate mortgages is clearly "other moneyed capital," within the meaning of R. S. 5219. This was conceded by appellee and recognized by the Michigan Supreme Court.

> "The terms of the act of Congress * * * include **shares of stock or other interests** owned by individuals in all enterprises in which the capital employed in **carrying on its business is money,** where the object of the business is the **making of profit by its use as money** . . . reduced again to money and reinvested."

Mercantile Bank v. *New York,* 121 U.S. 138, 157; 30 L. Ed. 895.

National Bank Shares are Taxed at a "Greater Rate" than Other Moneyed Capital.

Act 9 placed bank shares in "a special and more heavily taxed category" (358 Mich. 611, 614) taxing such shares at a "greater rate," 8 or more times the rate imposed on savings and loan associations and their shares. See *infra,* pp. 47-49.

2.

Moneyed Capital Employed by Savings and Loan Associations "Coming into competition with [a substantial phase of] the business of national banks."

The record in this case proves beyond question the fact of actual and direct competition between national banks and savings and loan associations in Michigan. It shows that both institutions were actively and substantially engaged during the tax year in question, and to date, in seeking and securing in the same localities throughout the State investments of the same class, i.e., residential mortgage loans, and that this business, insofar as national banks and appellant were and are concerned, represented a substantial phase of their business. See Statement of Case, *supra*, pp. 9-17.

3.

The competing moneyed capital of savings and loan associations is "substantial when compared with the capitalization of national banks."

This third element of the test under R. S. 5219 has been held by this Court to be implicit in the statute.

> ". . . §5219 is violated wherever capital, substantial in amount **when compared with the capitalization of national banks,** is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." *First National Bank of Hartford* v. *City of Hartford*, 273 U.S. 548, 558; 71 L. Ed. 767.

It is undisputed that other moneyed capital invested in all savings and loan associations in Michigan in 1952 (in excess of $468,000,000) (Ex. 221 R. 1284a) was approximately three times the total capitalization of all national banks in Michigan ($166,724,000) (Ex. 103 R. 1251a), and such other moneyed capital in associations located in the cities where appellant operated ($134,438,000) (Ex. 209 R. 1273a) was

approximately ten times the capitalization of appellant bank ($13,038,000) (Ex. 3 R. 932a).

Nationally, in 1952, the moneyed capital represented by shares in savings and loan associations amounted to $20,853,000,000 (Ex. 224 R. 1288a) as compared with $7,059,000,000 (Ex. 224), the capitalization of all national banks.

That the competition between savings and loan associations and national banks for residential mortgage loan business is "substantial" cannot be denied and does not need any showing as to its relation to the "total financial business" in Michigan during the tax year in question, as appellee suggested in its Motion to Dismiss or Affirm, page 9. To require a national bank to establish the total amount of **all other moneyed capital** in a state would not only place an impossible burden of proof on national banks but would permit a clear discrimination in favor of a substantial amount of moneyed capital in direct competition with the national banking business. Where a substantial phase of the banking business is discriminated against by favoring moneyed capital similarly invested which is also substantial, there is no necessity for inquiring or proving how other moneyed capital not so invested in the state is taxed. To do so would in no way alter the fact that the bank has been placed at a definite disadvantage as regards a substantial part of its business. For this reason, this Court held that the pivotal consideration is whether the **capital employed in competition** (with a substantial phase of the business of national banks) is "substantial in amount when compared with the capitalization of national banks," *Hartford, supra.*[34]

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[34]Not only is there abundant proof of the substantiality and extent of competition for residential mortgage business between savings and loan associations and national banks in Michigan, *supra*, pp. 9-17, but ti e was introduced at the trial (over the

(Continued on next page)

Under the controlling decisions of this court, Act 9 is invalid and in conflict with R. S. 5219.

Where, as here, substantial amounts of moneyed capital are invested in and employed by savings and loan associations in direct competition with a substantial phase of the business of appellant and other national banks, to-wit: the business of making loans on residences and other real estate in the same localities, the case, we submit, is wholly concluded by the following decisions of this Court, next discussed.

First National Bank v. *Hartford*, 273 U.S. 548; 71 L. ed. 767, went into so many features of the matter both of law and of fact that a rather lengthy discussion of the case seems imperative. The suit was to recover the tax on a national bank's shares for the year 1921. This Court found that it was apparent that the ad valorem tax imposed upon national bank shares was at a greater rate than the income tax imposed upon credits and intangibles, but the Court further held:

"... it is not sufficient to show this discrimination alone." (552)

The Court carefully pointed out that:

(Continued from page 31)

objection of appellee) a voluminous abstract of every one of 24,126 real estate mortgages recorded in 1952 in the seven counties in which appellant bank operates (which took two men three full months to prepare). From this abstract, summaries were made and introduced into evidence, showing the number and dollar volume of all mortgages made in each of said counties in 1952 by (a) savings and loan associations, (b) appellant bank, (c) other banks, (d) insurance companies, (e) other corporations, (f) individuals, and (g) credit unions, together with a combined recap for all seven counties (Ex. 65A-F; R. 1021-4a). The amount and proportion of such loans made by the savings and loan associations to the total is substantial.

As noted before, their share of the residential mortgage market has increased significantly and today The Savings and Loan Foundation advertises nationally that such associations make residential mortgage loans "more than all other financial institutions combined." See footnote 32, *supra*, p. 24.

"The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks." (552)

This was the question discussed and decided in the case. The Court concluded in *Hartford* that:

"Competition may exist between other moneyed capital . . . within the purpose of §5219, even though the competition be with **some** but **not all phases** of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. (557)

". . . Our conclusion is that §5219 is violated **wherever** capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." (558)

The nature of the evidence considered by this Court in reaching this conclusion was as follows:

"The evidence shows that plaintiff in the course of its business receives deposits, loans money, has a savings department, deals in exchange, buys and sells notes, government and other bonds, discounts commercial paper and acquires real estate mortgages by loan and purchase . .

"There are **real estate firms** engaged in lending money to individuals in the vicinity of plaintiff's banking house, the amount thus loaned amounting annually from $250,000 to $300,000. * * * And similar conditions obtain throughout the state. There are various individuals, copartnerships and corporations in the vicinity engaged in the business of acquiring and selling notes, bonds, mortgages and securities. Substantial capital is employed in their business." (553).

"* * * it affirmatively appears from the evidence, that there are individuals, firms and corporations in Wisconsin, not required by its laws to be incorporated as banks, engaged in the business of loaning money on the security of notes, bonds, and mortgages, and buying and selling securities, all involving investment and reinvestment by them and their customers. Through the activities of these business concerns, large investments are made and remade in such securities. Large amounts of capital are thus employed in some of the ordinary banking activities although these individuals and firms do not receive deposits . . ." (555)

The Wisconsin Court there, like the Michigan Court here, denied recovery construing the decisions of this Court "as requiring equality in taxation only of moneyed capital invested in businesses substantially identical with the business carried on by national banks." (555)

This Court, rejecting that construction of R. S. 5219, said:

"Under this [the Wisconsin Court's] view, if logically pursued, capital invested in businesses engaged in **some but not all of the activities of national banks** * * * could not be considered in determining the question of competition . . ." (556).

"The **restriction applies** as well **where the competition exists only** with respect **to particular features of the business of national banks** or where moneyed capital is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment . . ." (556).

"Here large amounts of capital are shown to be invested in businesses carried on throughout the state which are of the same character as some though not all of the business carried on by national banks. In two fields at least, loans and sales of credits, capital thus employed is shown to be in substantial competition with that of national banks . . ." (558-9).

"It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are **substantial in amount** . . . " (559).

"plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them . . . To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks" (560).

Most pertinent are statements in *Hartford* at p. 557, lines 25-34; and p. 558, lines 2-21, quoted infra, pp. 39-40, holding that **"manner of employment"** of other moneyed capital and **"not . . . character of the business"** determine the question of competition with national banks under R. S. 5219.

To the same effect, and decided on the same day as *Hartford*, is *Minnesota* v. *First National Bank*, 273 U.S. 561; 71 L. Ed. 774, in which this Court said:

". . . the competition guarded against by §5219 . . . may arise from the **employment of capital** invested by institutions or individuals **in particular operations or investments** like those of national banks." (567).

First National Bank v. *Anderson*, 269 U.S. 341; 70 L. Ed. 295, reversed a judgment of the Iowa Supreme Court, which had dismissed the bank's petition. The case stated in the petition is summarized at page 351:

"Some of these [allegations] are directly to the effect that the tax on the shares was computed at the rate of one hundred and forty-three and five-tenths mills on the dollar, while that on notes, mortgages and other evidences of indebtedness, 'such as normally enter into the business of banking' and representing moneyed capital of individual citizens 'engaged in competition' with the bank, was computed at five mills on the dollar" (351).

The amount taxable at five mills was alleged to be approximately $5,000,000. This Court, holding that the state tax vio-

lated R. S. 5219, reviewed the earlier decisions and summarized the same in four numbered paragraphs, pages 347 and 348, holding that:

> ". . . every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction . . . " (348).

The addition to R. S. §5219 by the Act of 1923 of the words "coming into competition with the business of national banks," etc. were discussed and it was said:

> "* * * the reenactment did no more than to put into express words that which, according to repeated decisions of this Court, was implied before" (350).

In *Merchant's Nat'l Bank* v. *Richmond,* 256 U.S. 635; 65 L. Ed. 1135, the City of Richmond (Va.) assessed national bank shares for the year 1915 at $8,000,000, state banks and trust companies at $6,000,000 and "bonds, notes and other evidences of indebtedness" at $6,250,000. The latter were taxed at a lower rate than the bank shares. The Virginia Court held that, there being no difference in the tax rate on state and national bank shares, the lower rate on the other class was immaterial. This court said:

> "* * * It is to be inferred that a substantial part of this aggregate was in the hands of individual taxpayers; the precise amount does not appear. It also was shown by evidence without dispute that moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes into competition with the national banks in the loan market." (638).

The Court then reviewed and restated the rulings as to what is meant by moneyed capital, page 639, second paragraph, and 641 beginning with line 7. The essence of the decision is:

". . . while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking." (639)

The Richmond tax was held by this court to be in violation of R. S. 5219 and the judgment of the Virginia Supreme Court was reversed.

To the same effect see *Public National Bank of New York* v. *Keating, et al.* (CCA 2, 1931), 47 F. 2d 561; affirmed Per Curiam, *Keating* v. *Public National Bank,* 284 U.S. 587; 76 L. Ed. 507. The rules of *Hartford* and *Minnesota* were well summarized—insofar as is here applicable—by the Second Circuit Court of Appeals, 47 F. 2d 561, 564.

II

THE DECISION OF THE MICHIGAN SUPREME COURT IS IN DIRECT CONFLICT WITH THE CONTROLLING DECISIONS OF THIS COURT AND WOULD NULLIFY R. S. 5219 AND MAKE IT INOPERATIVE.

The Michigan Supreme Court made three basic errors in its decision.

1.

The Michigan Supreme Court erred in holding that as a matter of law savings and loan associations cannot be in competition with the business of national banks because they are "different in character, purpose and organization from national banks" and operate "in a narrow, restricted field."

The Michigan Supreme Court quoted (358 Mich. 611, 618) and considered:

> "Defendants summarize their position as follows:
>
> 'In the last analysis, savings and loan associations cannot be in ""substantial competition with the business of national banks" because they cannot and do not engage sufficiently in the activities characteristically carried on by the national banks. Stated another way, if they are not comparable institutions in substance, how can they be in substantial competition?' "

Notwithstanding the proven fact of competition by savings and loan associations with a substantial phase of the business of appellant and other national banks in the state, the Michigan Court concluded (639) that:

> "Michigan building and loan associations operated in a narrow, restricted field, are markedly different in character, purpose and organization from national banks, and are not in 'substantial competition' with national banks."

The Michigan Court's conclusion followed the above quoted summary of appellees' position based on their contention that **banks** receive deposits and engage in all activities of the banking business, of which the loan of moneys on residential mortgages is but one phase [even though over 40% of appellant's total loans]; whereas, **savings and loan associations** are not permitted to "accept deposits" or to "do a banking business," and their business is limited "solely in the narrow activity of making first mortgage loans secured by residential properties . . ." (618).

The same argument was made and followed by the Wisconsin Supreme Court in *Hartford,* but was explicitly rejected by this Court (273 U.S. 548; 71 L. Ed. 767). This Court recognized that:

> "Large amounts of capital are thus employed in some of the ordinary banking activities although these individuals and firms **do not receive deposits.**" (555),

but, nevertheless, held:

> " . . . this Court has recently had occasion, in reviewing the earlier decisions dealing with this subject, to point out that the requirement of approximate equality in taxation **is not limited to** investment of moneyed capital in shares of **state banks or** to competing capital employed in **private banking. The restriction applies as well where the competition exists only with respect to particular features of the business of national banks . . .** (556)

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of §5219, even though the competition be with some but not all

phases of the business of national banks . . . Competition in the sense intended arises **not from the character of the business** of those who compete, **but** from the **manner of the employment of the capital** at their command . . . (557)

"To so restrict the meaning and application of R. S. 5219 would defeat its purpose. . . . With the great increase in investments by individuals and the **growth of concerns engaged in particular phases of banking** shown by the evidence in this case and in *Minnesota* v. *First National Bank of St. Paul* . . . [273 U.S. 561,567], discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed. Our conclusion is that §5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." (558).

To the contrary, the Michigan Supreme Court erroneously concluded that because the savings and loan associations were not banks of deposit, R. S. 5219 was not violated, saying (358 Mich. 611, 635):

> "The fundamental difference between a bank making loans from deposits and loans made otherwise, was recognized in *First National Bank of Shreveport* v. *Louisiana Tax Commission* (1933), 289 U.S. 60; 77 L. Ed. 1030."

In *Shreveport* this "difference" was relied upon solely to show an "ample basis for classification" to meet one challenge of the bank, that the equal protection clause of the Fourteenth Amendment had been violated (64). This difference in character or source of the moneyed capital, however, was not considered by this Court as a defense to the other challenge of the bank, that R. S. 5219 had been violated. As

regards R. S. 5219, this Court held that "fact" of competition was the controlling test. The record in *Shreveport* clearly showed that in that case "there was no competition with the national banks on the part of any concern lending money on mortgages of real estate; because national banks will **never handle such loans"** (66) and, therefore, R. S. 5219 was not violated; whereas the record in the case at bar clearly proves competition and violation of R. S. 5219.

In effect, the Michigan Supreme Court's reasoning is nothing more than the old argument that R. S. 5219 should apply solely to state banks, the only institutions which are substantially identical to national banks and are similar in "character, purpose, and organization" to national banks. To so confine R. S. 5219 would be contrary to *Merchant's National Bank* v. *Richmond, supra,* and also to the 1923 amendment to R. S. 5219 as it has been consistently construed by *Hartford* and other post-1923 cases. See *supra,* p. 36. It would, in fact, restrict R. S. 5219 in a manner which Congress has consistently refused to do, despite repeated proposals.[35]

Notwithstanding, appellee still contends, and the lower court held, that as a matter of law there cannot be "substantial competition" because savings and loan associations oper-

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[35]Proposals to limit state taxes on national bank shares to that imposed on shares of state banks—thus permitting other competing moneyed capital to be taxed at lower rates by the states—have been rejected by Congress since 1923. Hearings before Senate Banking and Currency Committee, on S. 1575, 70th Cong., 1st sess. (1928), pp. 2, 476. Hearings on H. R. 8727 before the House Committee on Banking and Currency, 70th Cong., 1st sess., 1928, pp. 1, 1124 (after *Hartford*); S. 3009, 1934 Congressional Record, 73rd Cong., 1st sess., p. 4041; H.R. 9045, 1934, Ibid., pp. 6375, 10294 (after *Shreveport*).

ate in a "narrow and restricted field" and do not perform the "major or characteristic functions" of national banks.

Relying upon its expert witness, Professor Woodworth, appellee asserts that the "major or characteristic functions" of national banks are their so-called "monetary functions"[36] —which can only be performed by a bank—and concludes that because savings and loan associations do not perform these functions they cannot be in "substantial competition" as a matter of law.

Professor Woodworth, upon cross-examination, admitted that in the banks' so-called "secondary functions,"—the making of loans and discounts, including the making of residential mortgage loans—national banks and savings and loan associations do compete substantially (R. 869a, 875a); that as to national banks in Michigan the residential mortgage business was a "sizable part of their total loans" (R. 878a; 905a); and that the interest derived therefrom was an "important and sizable" part of total income (26% for appellant bank) so far as banking operations were concerned (R. 881a; 905a).

Professor Woodworth admitted that the primary or monetary functions of a bank (see footnote 36) had reference to demand deposits which were "associated more with non-earning assets" in the form of primary reserve, cash, balance due from other banks, reserve to the Federal Reserve, items in process of collection (R. 881a). Furthermore, demand deposits "subject to check on demand . . . have to be kept in fairly liquid form" (R. 882a). We submit that a national bank earns most of its income by the making of loans and

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[36] The monetary functions, according to appellee's witness, Professor Woodworth, are: (a) providing a safe and uniform currency; (b) serving as a depository for the federal government and assisting the treasury in its fiscal operations, and (c) providing a safe check book money for business and the general public (R. 823-24a).

discounts, including long term residential mortgage loans.[37] Clearly, therefore, unless R. S. 5219 protects national banks in the performance of their money-making "secondary functions"—loans and discounts—they would be unable to perform their primary or any other functions.

The Comptroller of Currency, who is charged with the supervision of all of the thousands of national banks throughout the United States, does not subscribe to the theory regarding competition suggested by Professor Woodworth on behalf of appellee and followed by the lower court. The Comptroller recently testified before Congress that:

> ". . . banks are finding themselves more and more in competition with . . . Federal and State chartered savings and loan associations . . ."

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[37] Ex. 3 (R. 931a), the Statement of Condition of appellant bank at 12/31/52, shows that Loans and Discounts (item 6) were $146,411,387, or almost 50% of the bank's total assets; the other large items of assets being cash (item 1), $46,045,857, which earned no income, and Government securities (item 2), $107,803,407, which earned a much lower interest rate than loans.

Interest from loans accounted for $8,800,000 income, or about 80% of the total income of the bank; whereas income from the so-called monetary functions produced only 20% of bank's total income. See Ex. 205 (R. 1266a), appellant bank's operating statement for 1952.

For an analysis of appellant bank's Loans and Discounts at 12/31/52 see R. 934a, showing that its residential mortgage loans (item 6(b)(1)(2)(3)) and home modernization loans (item 7(c)), aggregating approximately $60,000,000, amount to over 40% of its total loans. It is to be noted that commercial and industrial loans (item 1), $22,318,916, account for only about 15% of the total loans. The extent of the loan activity of the bank, consolidated (R. 948) and by its seven offices (R. 950a-958a) may be of interest.

Banks operating in smaller communities, such as appellant—unlike the large Detroit and other metropolitan banks—are far more dependent upon residential mortgage loan business than upon commercial loans.

"Federal and State-chartered savings and loan associations are zealous and highly effective competitors for the funds of savers and for real estate mortgage loans . . ."

(See *infra*, p. 83)

Hartford and *Minnesota* have clearly rejected contentions such as those made by appellee. These cases hold that a state may not exempt or prefer other moneyed capital merely because it is engaged in some, but not all, of a bank's activities, or because it has a different character and purpose from national banks. In the case at bar, the Michigan court erred in holding that the state did not violate R.S. 5219 by preferring other moneyed capital invested in savings and loan associations because they are "different in character, purpose and organization from national banks" and that they operated in a so-called "narrow, restricted field" (residential mortgage loans), when the undisputed facts are that:

1. Residential mortgage loans amounted to 40% of appellant bank's total loans, 26% of its income[38] and 20% of its total assets.

2. All national banks in Michigan held $301,462,000 of residential loans amounting to 30% of their total loans and discounts.

3. The moneyed capital employed by such associations is three times the capitalization of all national banks in Michigan.

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[38] If income from home modernization loans were included with that derived from residential mortgage loans the percentage would exceed 32%, since the 26% figure does not include income from $8,317,000 home modernization loans (R. 539a; Ex. 205, R. 1266) and footnote 37, *supra*.

Savings and loan associations also made competing home modernization loans (R. 987a; 988a; 1008a).

The Home Owners Loan Act of 1933 does not Repeal R. S. 5219 by Implication.

R. S. 5219 was enacted to prevent states from discriminating against national bank shares in favor of other moneyed capital employed in substantial competition with the business of national banks--regardless of its "character, purpose and organization." *Hartford, supra.* Congress provided for no exemptions, exclusions or exceptions of any other competing moneyed capital in R. S. 5219.

Notwithstanding, appellee erroneously urges and the lower court held, that the Home Owners Loan Act of 1933 **by implication** evidences a Congressional intent to exclude shares in savings and loan associations from the operation of R. S. 5219. There is, however, nothing in the Home Owners Loan Act nor its Congressional history that supports such a conclusion. The Act provides merely that states may not impose a greater tax on federal associations than that imposed upon like local associations. The Act is **silent** as to **how shares in federal associations shall be taxed by a state** and in no way prescribes **how state associations or their shares shall be taxed.** Such Congressional prohibition is in no way inconsistent with the equally clear injunction of R. S. 5219 in respect to shares of national banks.

In protecting federal savings and loan associations from discrimination in favor of like state institutions, the 1933 Act in no way relieves a state from the obligation to safeguard national bank shares from state discrimination in favor of other moneyed capital (whether or not invested in state or federal savings and loan associations), when, as here, such moneyed capital is employed in keen competition with a substantial phase of the business of national banks.

If Congress, in enacting the Home Owners Loan Act of 1933, had intended that moneyed capital employed by such institutions were to receive favored tax treatment by states over tax treatment of shares of national banks—notwithstanding the unqualified prohibition to the contrary of R. S. 5219—Congress would have **expressly** so provided in the 1933 statute and to that extent **expressly** repealed R. S. 5219. There is no such express limitation or repeal of R. S. 5219 in the Home Owners Loan Act of 1933 and, contrary to the lower court's conclusion, there is no such repeal by implication.

As this Court has often held, it does not look with favor upon a claim of repeal of important legislation by implication—particularly in view of the pronouncement in *Hartford,* supra, and earlier cases that R. S. 5219 is not limited to other moneyed capital employed solely in the operations of banks of deposit.

2.

The Michigan Supreme Court erred in substituting a different test of discrimination—in effect, a different tax—than that permitted by R. S. 5219 for a tax on shares.

Act 9 imposes a tax on shares of national banks at a "greater rate than is assessed upon other [competing] moneyed capital."

Act 9 is a tax on shares of national banks. Under R. S. 5219, Sec. 1 (a), such a tax is in lieu of the other three methods permitted to a state taxing national banks or their shares. Sec. 1 (b) specifically provides the test and standard of tax equality and enjoins the State as follows:

> "Sec. 1 (b) In the case of a **tax on said shares** the tax imposed shall **not** be **at a greater rate** than is assessed upon other moneyed capital [shares in savings and loan associations] in the hands of individual citizens of such State coming into competition with the business of national banks . . ."

Under Act 9, the State of Michigan imposed a tax on shares of national banks at the rate of $5.50 per $1,000, based on their capital accounts (capital, **plus** surplus and undivided profits).[39] In comparison, the State taxed shares of savings and loan associations at the rate of $.40 per $1,000 of paid-in capital (**excluding** surplus, undivided profits and reserves).[40] In addition, state savings and loan associations—but not federal—were subject to an annual privilege tax of $.25 per $1,000 of capital and legal reserves (**excluding** surplus, general

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[39]C. L. '48, Sec. 205.132a (1953 Supp.); M.S.A. 7.556 (2a).

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[40]C. L. '48, Sec. 205.132; M.S.A. Sec. 7.556.

reserves and undivided profits).[41]

Exhibit 208 (R. 1270a) lists all state taxes imposed upon shares of national banks and of savings and loan associations, as well as other state taxes imposed upon either or both such banks and associations, with but one exception.[42] In this list of state taxes are taxes imposed upon both national banks and savings and loan associations alike, at the same rate and in the same manner, (1) real estate taxes, and (2) unemployment taxes. Therefore, these need not be considered in determining "greater rate." Nor should the fee charged for annual examination of state associations by the state supervisory agency be considered. The fee is for a service and is not a tax. National banks and federal savings and loan associations pay comparable examination fees for examinations by federal supervisory agencies. At all events, the amount of these fees is not substantial. The only other state taxes imposed upon a few—but not all—savings and loan

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[41]C. L. '48, Sec. 450.304a, M.S.A. Sec. 21.206.

The state associations get their right to do business from the state and the state levies a tax "upon the privilege of exercising corporate franchises." M.S.A. 21.205 as amended by Act 183 of 1952. Appellant national bank as well as federal savings and loan associations obtains its "privilege of exercising corporate franchises" from the U.S. and the State has no basis for charge therefor. Therefore, the amount of the franchise taxes should not even be included in determining the comparative tax rates on shares of the respective institutions. Nevertheless, even including this tax, the discrimination against shares of national banks is approximately 8 to 1 with respect to state associations and 13 to 1 with respect to federal associations.

[42]Section 2 of the Intangibles Tax (Act 301 of the Public Acts of 1939, as amended) levied a tax at the rate of 1/25 of 1% on bank deposits as of December 31, 1952. The tax paid by appellant bank pursuant to this statute for the year 1952 was $100,318.24 (Exhibit 1). This tax was not paid by savings and loan associations because "The savings and loan associations of Michigan cannot accept deposits, and, therefore, had none." (358 Mich. at 619; R. 1340).

associations, and not imposed upon banks, are inconsequential.[43] See Ex. 208, R. 1270a.

Clearly, therefore, Act 9 imposes a tax on shares of national banks at a rate more than 8 times greater than the tax on domestic savings and loan association shares ($5.50 per thousand compared to 65 cents per thousand), and more than 13 times greater than the tax on federal savings and loan association shares ($5.50 per thousand compared to 40 cents per thousand). See footnote 41. This discrimination is further intensified by the fact that, under the tax statute, *supra*, page 47, savings and loan shares are undervalued in relation to bank shares in that the association reserves and undivided profits are not included in the tax base at all. This amounts to $39,415,000★ as to association shares in Michigan in 1952 (R. 960a).

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[43]The following other state taxes shown in Ex. 208, R. 1270a. are called to the Court's attention solely for the purpose of completeness:

Savings and loan associations were subject to a tangible *personal property tax* (C. L. '48, Sec. 211.8, et seq.; M.S.A. Sec. 7.8, et seq.) to which national banks were not subject. However, the tax paid, if any, was insignificant. (Six of the associations located where appellant operates paid no personal property tax. The largest amount paid by any such association was less than $500.00.)

Sec. 3 of Act 183, P.A. 1952 (C. L. '48, Sec. 450.303; M.S.A. 21.203) imposed a *franchise tax* on domestic savings and loan associations of 1/10 mill upon their authorized capital. However, this tax is paid only at the time the articles of incorporation are filed or upon an increase in authorized capital stock. It is not an annual tax. During the year 1952, only one association doing business in a city in which plaintiff bank operated (East Lansing Savings and Loan Association) paid such a tax ($600.00).

States have no power to impose a *use tax* upon national banks for a privilege granted to them by the federal government. At all events, the use tax paid by all 17 savings and loan associations (in the total amount of $579.09) is insignificant.

★By 1956, these reserves and undivided profits of associations operating in Michigan had increased almost 100% to over $74,000,000 (R962a).

R. S. 5219 clearly establishes the basis of comparison for determining discrimination. When the tax, as here, is upon national bank shares,

> ". . . the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens . . ."

This necessarily involves, as this Court has recognized, a comparison between the tax burden imposed upon national bank shares and that imposed upon "other moneyed capital in the hands of individual citizens." It is not disputed in this case that shares in savings and loan associations are "moneyed capital in the hands of individual citizens."

In *People* v. *Weaver,* 100 U.S. 539, 545; 25 L. Ed. 705, the factors to be considered in making the comparison were described:

> "Congress had in its mind an **assessment,** a **rate** of assessment, and a **valuation;** and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital."[44]

In *Weaver,* the rate was the same, but the valuation was different. "Other moneyed capital" was valued on a lower basis, and the result was a discrimination prohibited by R. S. 5219. Here, not only is the basis of valuation of national bank shares higher than the valuation of savings and loan shares, but the rate of assessment greatly magnifies the discrimination, national bank shares being taxed at a rate of 8 to 13 times greater than the tax imposed on "other moneyed capital" (shares of savings and loan associations). The result is the same, a discrimination prohibited by R. S. 5219.

This Court said in *Pelton* v. *National Bank,* 101 U.S. 143, 146; 25 L. Ed. 901:

> "It is sufficient to say that we are quite satisfied that any system of assessment of **taxes which exacts** from the owner of the shares of a national bank **a larger sum in**

[44] Emphasis that of the Court.

proportion to their actual value than it does from the owner of other moneyed capital **valued in like manner,** does tax them at a greater rate within the meaning of the act of Congress."

Where the bank shares and "other moneyed capital" are "valued in like manner," the only remaining factor for consideration in determining whether there is discrimination under R. S. 5219 is the rate of tax imposed upon the bank shares as compared with the rate imposed upon "other moneyed capital." This is precisely what this Court did in *Merchants' National Bank of Richmond* v. *City of Richmond*, 256 U.S. 635; 65 L. Ed. 1135 (tax on bank shares approximately 3.5 times greater than tax on other competing moneyed capital); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239; 76 L. Ed. 265 (approximately 6 times greater); *Minnesota* v. *First National Bank of St. Paul*, 273 U.S. 561; 71 L. Ed. 774 (approximately 8 times greater); and *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341; 70 L. Ed. 295 (approximately 29 times greater).

Where valuation is on the same basis, but the tax on national shares is at a greater rate, there are no problems such as appellee suggests relative to "total tax burden," the lack of "equivalent tax burden," greater "tax impact" or lack of "substantial tax equivalence." Such problems arise only in cases where there are different measures or methods of valuation[45] or entirely different methods or systems of taxation,[46] as between national bank shares and other moneyed capital.

Clearly, in the case at bar, not only (a) is the rate of tax on national bank shares greater, but (b) the valuation of such shares is higher—because it includes all reserves and undivided profits, which are excluded by statute in valuing

[45] *People* v. *Weaver, supra.*

[46] *Tradesmen's National Bank* v. *Oklahoma*, 309 U.S. 560; 84 L. Ed. 947.

the association shares. The tax is discriminatory both as to rate and as to valuation.

The Michigan Supreme Court applied a test of discrimination expressly rejected by this Court.

Notwithstanding the proven discrimination, the Michigan Court (358 Mich. 611, 633) makes a comparison of the total tax burden (of all kinds of levies) on the total assets—without deducting liabilities—of Michigan National Bank and of savings and loan associations and finds the same to be substantially equivalent. This method of comparison was expressly rejected in *Minnesota, infra.*

The tax imposed by Act 9 is **"on said shares"**—which this Court has held to mean assets after deducting all liabilities—not gross "assets of the bank without deduction of its liabilities," *Minnesota* v. *First National Bank*, 273 U.S. 561, 564; 71 L. Ed. 774; *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103; 68 L. Ed. 191. As this Court said in Minnesota (p. 564):

> ". . . it is urged, if bank shares were taxed at the same rate without deducting the bank's liabilities in ascertaining the value of their shares, the amount of the tax would be approximately the same. **This argument ignores the fact that the tax authorized by §5219 is against the holders of the bank shares and is measured by the value of the shares, and not by the assets of the bank without deduction of its liabilities,** *Des Moines Nat. Bank* v. *Fairweather*, 263 U.S. 103, (68 L. Ed. 191, 44 Sup. Ct Rep. 23) and that the bank share tax must be compared with the tax assessed on competing moneyed capital of individuals invested in credits, or the tax on capital invested by individuals in the shares of corporations whose business competes with that of national banks . . . (cases cited)."

The state can levy taxes in respect of national banks only in such manner and to such extent as permitted by act of Congress. Congress has not permitted and the state cannot

levy a tax on total assets under R. S. 5219. The state cannot levy a tax on assets at all other than real estate. The state now comes along and says: "See how we have gotten around not being permitted to levy a tax on assets. We have levied a tax on bank shares which carries the same aggregate burden as a tax on total assets." As Congress has not permitted a tax on total assets, the use of total assets as a basis for comparison cannot be proper.

The Michigan Supreme Court, in considering Act 9, a tax on shares, has used a basis for comparison explicitly rejected by this Court.[47]

Appellee's other suggested test of discrimination is erroneous and in conflict with R. S. 5219.

Appellee in its Motion to Dismiss or Affirm, page 17, suggests another erroneous basis for tax comparison. Appellee contends that the tax burden should be related to "the reserves and undivided profits of the savings and loan associations (and) with the actual value of national bank stock" (**capital,** surplus, and undivided profits), erroneously **excluding** the substantial amount invested in shares of **capital** of the savings and loan associations.

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[47] Nor do the cases of this Court cited by the Michigan Supreme Court (358 Mich. 632), support a comparison of tax burden to assets (without deducting liabilities) explicitly prohibited by *Minnesota* and *Fairweather*. They merely stand for the proposition that where different methods of valuation are used, a difference in rate may not necessarily be discriminatory in a state tax on shares (cf. *People* v. *Weaver*, 100 U.S. 539; 25 L. Ed. 705); or, where a different method of taxation is used; if, when translated into the method employed in taxing national banks or its shares, there is approximate equality, discrimination under R. S. 5219 does not necessarily obtain (*Tradesmen's National Bank of Oklahoma City* v. *Oklahoma Tax Commission*, 309 U.S. 560; 84 L. Ed. 947; *Covington* v. *First National Bank of Covington*, 198 U.S. 100; 49 L. Ed. 963.)

This tax comparison was neither adopted by the Michigan Supreme Court nor by the appellee's own expert witness.[48] It necessarily assumes a tax which the State of Michigan does not impose, i.e., a tax on surplus and undivided profits of the associations. The only tax imposed by the State is a tax on the paid-in value of their shares—**excluding** their substantial general reserves and undivided profits (in excess of $39,415,000 for all associations in the state, R. 960a).

Appellee's argument is predicated upon appellee's erroneous claim that an investment in a savings and loan association is a deposit-debt, rather than a share-equity. Appellee thereby attempts to attribute the entire tax (which under the Intangibles Tax Act is on shares of savings and loan associations) solely to reserves and undivided profits—permitting the paid in value of the shares of savings and loan associations to escape the tax entirely.

Investors in savings and loan associations are stockholders—not depositors.

A savings and loan association "is a private corporation for profit." By statute and in substance investors are "shareholders"—not depositors or creditors. Savings and loan in-

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[48] As to this manner of comparing "tax burden," appellee's own witness, Professor Woodworth, stated: "I rejected that in my thinking as a proper basis of comparison." (R. 863a)

Nor does *Davenport Bank* v. *Davenport Board of Equalization*, 123 U.S. 83; 31 L. Ed. 94, cited by appellee, support appellee's contention that the capital invested in savings and loan association shares may be excluded in valuing other moneyed capital. In *Davenport*, which involved a stock corporation savings bank, the capital of the corporation was subject to the tax and this Court held: ". . . the same rate per cent is assessed upon the capital of the savings banks as upon the shares of the national banks."

Appellee, relying on dicta in *Amoskeag Savings Bank* v. *Purdy*, 231 U.S. 373; 58 L. Ed. 274, ignores the fact that in *Amoskeag* the proposition for which appellee cites that case was not urged and was not an issue in the case.

vestors are an **aggregation of persons** (both individual and corporate) who are engaged in the mortgage lending business for profit, in corporate form.[49]

Both the state and federal statutes under which state and federal associations are incorporated explicitly and expressly provide that savings and loan associations may not receive deposits. Mich. C.L. 1948, Sec. 489.37; M. S. A. 1957 Rev., Sec. 23.580; Fed. Code Ann., Sec. 1464 (b).

Moreover, in every substantial respect, investors in savings and loan associations are shareholders and not depositors (R164a, 245a, 295a, 372a). Unlike a depositor, a shareholder in a savings and loan association is not a creditor (R246a, 341a, 188a). Even after making application for withdrawal of his investment, Mich. Stat. Ann., Sec. 23.546 provides:

> "Shareholders . . . shall remain shareholders until paid and shall not become creditors."

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[49]To illustrate:—If an individual operated a mortgage business in non-corporate form—and received as income interest on mortgage loans, less expenses and a reasonable reserve for losses, keeping principal payments received from mortgage loans reinvested in new mortgage loans—such operation would essentially be comparable to the business of savings and loan associations in corporate form. He could keep all of this principal invested in the business or withdraw such part as he wished. His investment in the business would be put out on loan to mortgage borrowers, from whom he would receive (a) repayment of fixed principal (par), in installments, plus (b) interest upon such loans. His only income would be the interest from the loans. On windup of such business, any reserve for losses retained in the business would naturally be retained by him. That is essentially the position of a shareholder investing money in a savings and loan association—except that the association does business in corporate form, and instead of an individual, there are many shareholders, all engaged in a commercial enterprise, making loans to the general public, on the security of residential mortgages, for the highest return obtainable competitively—for a profit.

(Continued on next page)

An investor is a shareholder in a corporation engaged principally in the mortgage business (R295a, 372a). As such, he assumes the risks of profit or loss in the operation of such business (R164a, 165a, 245a). He receives dividends, if declared, the payment and amount of which are dependent upon whether the operations of the corporation are profitable (R245a, 295a, 342a, 425a, 188a). Unlike a depositor, he has no contractual right to receive interest, regardless of the successful or unprofitable operation of the business (R163a, 295a, 341a, 372a, 425a). He has voting rights dependent upon the number of shares owned and accordingly is vested with ultimate control over the operations of the association (R165a, 195a, 293-4a, 374a). Conversely, a depositor, as a creditor, has no voice in the operation of a bank.

Upon liquidation, shareholders in a savings and loan association share in the entire equity of the association, capital, surplus, and undivided profits. His rights are, however, subordinate to those of creditors. Upon liquidation, a depositor receives only repayment of his fixed debt, although his claim has priority over the interest of shareholders.

In *Michigan Savings and Loan League* v. *Municipal Finance Commission of the State of Michigan* (1956), 347 Mich. 311, 319; 79 N. W. 2d 590, the plaintiff, seeking a determination that State agencies were not prohibited under the Michigan Constitution from subscribing for shares in savings and loan associations:

(Continued from page 55)

Money of individuals engaged in the mortgage lending business in competition with the business of national banks is "other moneyed capital" within R. S. 5219 and cannot be taxed at a rate less than that imposed upon shares of national banks. *Hartford, supra,* p. 34. So, too, if the individuals engage in such business in corporate form, their shares are "other moneyed capital" within R. S. 5219; *supra,* p. 29.

". . . argued, **in substance,** that investments in savings and loan associations of the character involved in this case **should not be regarded as stock purchases,** that the investor **is actually depositing funds for safekeeping,** that the transaction **is analogous to a deposit in the savings department of a bank . . .**"[50]

Rejecting this contention, the Michigan Supreme Court held (322):

"This Court has recognized that **investors in savings and loan associations are** subscribers to, or **purchasers of, stock** therein . . .

". . . **It may not accept deposits in the sense that such are received by banks . . .**"

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[50]**There**—contrary to his present position—the Attorney General of the State of Michigan successfully opposed such contention, arguing in his Brief to the Michigan Supreme Court in that case:

"Plaintiffs cannot successfully contend that building and loan and savings and loan associations are not corporations. **A building and loan association is a private corporation for profit.**" (Brief, p. 7.)

"The Michigan Building and Loan Act and the federal statute providing for federal savings and loan associations settle the question whether payments on shares constitute deposits. Section 37 of the Michigan act . . . expressly prohibits . . . advertising for or receiving deposits . . . Likewise, the federal act . . . forbids the acceptance of deposits." (Brief, p. 15.)

". . . Plaintiffs consider the insurance feature one element indicating that the investor on such insured shares is not a shareholder. Such insurance would make an investment in shares a safer investment than it would be without such insurance, but it would seem self evident that it could not change the essential nature of the stock, nor the relation between the shareholder and the association. Suppose, for example, a person owns $20,000 of fully paid shares in a building and loan association. Is he partly a shareholder and partly something else? And of which shares is he a shareholder? It is respectfully submitted that the insurance feature has no bearing on the issue." (Brief, p. 17.)

Even if the shares were like "deposits" in a mutual savings bank, they would be "other moneyed capital" and could not be valued on a lower basis nor taxed at a lower rate than national bank shares.

In no event are shareholders of savings and loan associations like depositors of a bank. The most that has been suggested is that they are akin to "depositors" of the old mutual savings banks (even though directly contrary to Federal statute, Michigan statute, and Michigan decision). But, even if this be so, appellee's position is not tenable under R. S. 5219. The Federal statute requires that national bank shares shall not be taxed at a greater rate than **other moneyed capital** in the hands of **individual citizens.** Whether shareholder (as appellant submits) or depositor (as appellee contends), the investment in savings and loan associations by individuals is "other moneyed capital," within the meaning of R. S. 5219. In *Mercantile Bank* v. *New York,* 121 U. S. 138, 157; 30 L. Ed. 895, involving mutual savings banks, this Court said (p. 157):

> "It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase."

Since, in the case at bar, this moneyed capital, employed for profit in the mortgage lending business in competition with the business of national banks, is taxed at a substantially lower rate than national bank shares, R. S. 5219 is violated.

In effect, what appellee urges is that national bank shares should be valued at their actual value (**capital plus** surplus, and undivided profits) whereas other competing moneyed capital, shares (or deposits) in savings and loan associations), should be valued at only a small fraction of their actual value (reserves and undivided profits, but **excluding "paid in" capital**). By thus greatly and erroneously under-

valuing "other moneyed capital," appellee concludes there is no tax discrimination.

Clearly, the foregoing argument of appellee is contrary to *People* v. *Weaver, supra,* cited by appellee, and to this Court's holding in *Pelton* v. *National Bank,* 101 U. S. 143, 146, *supra,* page 50.

Discrimination is determined by effect of tax, rather than by hostile intent.

Appellee urges, and the lower court held, that the Michigan tax is not discriminatory nor violative of R. S. 5219, because—

> "Michigan's tax treatment . . . does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks."

In *Hartford, supra,* the same contention was made by the appellee and had been sustained by the Supreme Court of Wisconsin. However, this Court unequivocally rejected this position, holding (273 U. S. 560):

> "But a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and **taxing measures which by** their **necessary operation and effect discriminate** against capital invested in national bank shares in the manner described **are** intended to be **forbidden**."

3.

The Michigan Supreme Court erred in permitting the State, under a so-called doctrine of "partial exemption," to discriminate against national bank shares in favor of other moneyed capital employed under private management, for profit, in competition with a substantial phase of the business of national banks.

The remaining basic question is whether or not a state, for reasons of its own—notwithstanding R. S. 5219—may "partially exempt" from taxation (prefer taxwise)

(1) "other moneyed capital" (savings and loan shares);

(2) clearly "coming into competition with [a substantial phase of] the business of national banks," and

(3) "substantial when compared with the capitalization of national banks" in the state.

The lower Court erroneously concluded that the State of Michigan could do so (358 Mich. 611, 620, 639), notwithstanding that no such exception is expressed in the statute, and that such a "partial exemption," if recognized, would defeat the purpose of the statute, i.e. the avoidance of discrimination against national bank shares in favor of huge amounts of other moneyed capital locally employed in competition with national banks.

The State asserts and the Michigan Court affirms the assertion that the difference between the rate of tax on national bank shares and shares of savings and loan associations in Michigan is a "partial exemption" of the latter, and hence justified. To indulge in semantics should not get one anywhere, and that is what the State does here. None of these shares are exempt from tax—they are merely taxed at a lower or preferred rate. **A difference in rate is a discrimination.** Under the facts of this case, we submit, a state has no power

to discriminate against national banks or their shares under a so-called doctrine of "partial exemption."

In reaching its conclusion that Michigan may exempt or prefer savings and loan associations or their shares, the Michigan Court relied upon eight cases of this Court, none of which involved savings and loan associations and all of which were decided prior to 1900, and two lower court cases:

(a) Three of these cases[51] involved the exemption of property—**not "moneyed capital,"** as that term has been defined since *Mercantile,* supra, p. 29—and therefore **not in competition** with the business of national banks;

(b) Three of these cases,[52] including *Mercantile,* involved mutual savings banks which (i) were **not found in competition** with the **then** business of national banks; (ii) were **publicly managed** for public or quasi-charitable purposes; and (iii) were **not privately operated,** in "a commercial sense," **for profit;**

(c) Two of these cases[53] are clearly not in point as they in no way involved the question presented by this appeal, except by way of dicta in reviewing prior cases (mentioned and distinguished under (a) and (b) above);

(d) The two lower federal court cases,[54] *Hubbard*

[51] *Hepburn* v. *School Directors,* 23 Wall (90 U.S.) 480, 485; 23 L. Ed. 112; *Adams* v. *Nashville,* 95 U.S. 19, 22; 24 L. Ed. 369; *Boyer* v. *Boyer,* 113 U.S. 689, 693; 28 L. Ed. 1089.

[52] *Mercantile Bank* v. *New York,* 121 U.S. 138; 30 L. Ed. 895; *Davenport Bank* v. *Davenport Board of Equalization,* 123 U.S. 83, 86; 31 L. Ed. 94; *Bank of Redemption* v. *Boston,* 125 U.S. 60; 31 L. Ed. 689.

[53] *Aberdeen Bank* v. *Chehalis County,* 166 U.S. 440, 460, 461; 41 L. Ed. 1069; *First National Bank of Wellington* v. *Chapman,* 173 U.S. 205, 214; 43 L. Ed. 669.

[54] *Mercantile National Bank of Cleveland* v. *Hubbard* (ND Ohio) 98 F 465, 471; *Hoenig* v. *Huntington National Bank of Columbus,* (CCA 6) 59 F 2d 479, 482, certiorari denied 287 U.S. 648; 77 L. Ed. 560.

> and *Hoenig,* involved savings and loan associations which were **not in competition** with the **then** business of national banks.

These cases, we submit, are inapposite.

The first three cases, as stated, involved property not "moneyed capital" as presently defined. When these cases were decided (1874-1885), the term "moneyed capital" was construed to include every type of intangible personal property and this Court, with that sweeping a definition in mind, simply affirmed the states' right to **totally, not partially,** exempt from taxation some property, such as municipal bonds, homesteads, the property of clergymen and the like—which was not in competition with the business of national banks. Competition was not then a factor and was not considered.

The next three cases decided in 1887 and 1888, involved, amongst other things, mutual savings banks. *Mercantile* introduced the present concept of "moneyed capital" and was the first to consider "competition" as a factor. As to deposits in savings banks, this Court held such moneyed capital could be totally exempt without violating R. S. 5219 because—national banks **then** were not permitted to engage in the mortgage loan business or to accept savings deposits, supra, p. 18—

> "No one can suppose for a moment that savings banks come into any possible competition with national banks . . ." (121 U.S. 161).

This is not so today as to savings banks. More importantly, it is clear that **today** savings and loan associations are in sharp competition with the business of national banks, *supra,* pp. 9-20.

Davenport held only that there was no discrimination be-

tween the tax imposed upon national bank shares and on shares of savings banks in Iowa.

In *Bank of Redemption* (1888), decided one year after *Mercantile*, it was, however, urged by plaintiff bank that "... Massachusetts Savings Banks are permitted to transact a banking business in the way of loans upon personal securities,[55] which assimilate them more closely to national banks" (125 U.S. 68) than to the savings banks involved in *Mercantile*. Without making any finding as to whether these investments were legally available to—or employed by—national banks, the Court summarily dismissed the point, saying (125 U.S. 68):

> "But the difference mentioned, **if it exists at all,** is immaterial; the **main purpose and chief object** of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the *Mercantile Bank*. They are substantially institutions, under **public management,** in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and **not** as banking institutions **in the commercial sense** of that phrase."

The Wisconsin Court in *Hartford*, 187 Wis. 290, 203 N.W. 721, 727-9, (like the Michigan Court in the instant case), expressly relied upon the foregoing language from *Bank of Redemption*, supra, (as well as the so-called partial exemption cases relied upon by the Michigan Court in the case at bar) (203 N.W. 727-9), and the Wisconsin Court concluded that the "object" and "purpose" of building and loan associa-

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[55] This was one of the 8 classes of investments open to Massachusetts savings banks. It was, however, to be employed only "if the deposits cannot be conveniently invested in the modes heretofore named." These investments were moreover limited to not more than ⅓ of the deposits in such banks, and required two sureties on such loans.

tions, as well as other moneyed capital—regardless of manner of employment of capital—was the test of "competition" within the meaning of R. S. 5219. This partial exemption argument was also urged by the State in its brief before the Supreme Court in *Hartford* (pp. 37-42). Nevertheless, this Court reversed the Wisconsin Supreme Court's decision and specifically stated (273 U.S. 557):

> **"Competition** in the sense intended arises **not from the character of business** of those who compete **but from the manner of the employment of the capital** at their command."

To the extent, if any, that *Bank of Redemption, supra,* is based upon a different test, it is necessarily overruled by later decisions, particularly *Hartford.*

There is another important distinction between the early savings bank cases and the instant case involving present-day savings and loan associations. An institution managed and operated by **"public trustees"**[56] solely to conserve the savings of poor people can hardly be said to be using its moneyed capital in competition with national banks. As the Court recognized in *Bank of Redemption,* they were not "banking institutions in the **commercial sense** of that phrase" (68).

This Court in the early cases equated "deposits in savings banks"—publicly managed and operated to conserve funds of poor people, not for profit in the "commercial sense"—with "moneys belonging to charitable institutions." See *Aberdeen Bank* v. *Chehalis County,* 166 U.S. 440, 460-1;

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[56] The character of the early savings banks is described by this Court in *Bank of Redemption* v. *Boston,* 125 US 60, in which the Court said:

> "The institutions themselves, although corporations, have no capital stock and are **managed by trustees, not selected by the depositors, but by public authority."** (66)

First National Bank of Wellington v. *Chapman*, 173 U.S. 205, 214.

On the other hand, **today** "a building and loan association is a private corporation for profit." This we contend. This the Attorney General of Michigan also acknowledged and successfully urged in *Michigan Savings & Loan League* v. *Municipal Finance Commission of the State of Michigan*, *supra*, p. 57, foot note 50.

Change in the manner and scope of doing business by savings and loan associations and national banks since 1900 makes the early cases inapplicable.

In *Hartford*, this Court stated:

> "Some of the cases dealing with the technical significance of the term competition in this field were decided **before** national banks were permitted to invest in mortgages as they **now** are. Act of December 23, 1913, c. 6, §24, 38 Stat. 251, 273; Act of September 7, 1916, c. 461, 39 Stat. 752, 754; Act of February 25, 1927, §24. And others go no further than to hold that in the absence of allegation and proof of competition with national banking capital, it cannot be said that an offending discrimination exists" (273 U.S. 558).

As previously set forth, *supra*, pp. 18-20, national banks did not have authority to make mortgage loans generally until the Act of September 7, 1916, and then the authority was quite restricted. The restriction was lessened by the Act of February 25, 1927 and was substantially removed by the Act of August 23, 1935, permitting conventional loans of 60% of assessed value for a 10 year term if 40% of the principal was amortized within 10 years; the Act of June 27, 1934, authorizing the making of F.H.A. mortgages, and the Comptroller General's decision of 1944 authorizing the making of V.A. (or G.I.) home loans. The first express mention by Con-

gress of a national bank's right to accept "savings deposits" was in 1927. See footnote 27A, *supra*, p. 18.[57]

It necessarily follows that cases involving the making by state institutions or others of mortgage loans or of accepting and investing savings deposits at a time when national banks did not have authority or were not exercising authority to do either are inapplicable to present day conditions.

Savings and Loan Associations of the early days.

Not only do appellee and the court below rely upon early cases when national banks could not and did not compete, but at such time savings and loan associations were substantially different in character and in their method, manner and scope of operation from the large, commercially operated, profit-making, savings and loan associations of the present day.

The mutual savings banks and building and loan associations of 1900 and earlier years were both peculiar and unique quasi-charitable institutions, employing their moneyed capital exclusively for the sole benefit of "poor people" to aid them in "accumulating small savings" and or in "building small houses." Both mutual savings banks[58] and savings

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[57] Such extensions of power have not been attacked except in *Franklin National Bank* v. *N. Y.*, 347 U.S. 373; 98 L. Ed. 767; where this Court, rejecting such attack, said:

> "That these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority." (375)

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[58] **Mutual savings banks,** in their origin, were designed solely for persons of modest means, primarily the working classes; mariners, tradesmen, clerks, mechanics, servants and others. Until the advent of these banks of deposit, which **operated under public man-**

(Continued on next page)

and loan associations served a unique function not open to the national banks of their day.

(Continued from page 66)

agement, there was no place where wage-earners could safely put aside some of their earnings for future needs. Prior to 1900, there was no savings feature in life insurance policies. Postal savings were not adopted until 1910, and **national banks were not authorized to accept savings deposits until 1927.** Investments by savings banks were strictly defined by statute. Usually they were permitted to invest in government securities of various types and in **real estate mortgages,** primarily on residential properties, **neither of which were in competition with national banks as they were then operated.** [Lintner, Mutual Savings Banks in the Savings and Mortgage Markets, (Harvard University, 1948), Chp. II; The Miracle of Mutual Savings, 1834-1934 (Bowery Savings Bank); Mutual Savings Banking (National Ass'n of Mutual Savings Banks, 1953); 4 McKinney's Consolidated Laws of New York, Secs. 230 et seq.]

The Circuit Court in *Mercantile National Bank v. City of New York* (1886), 28 Fed. 776 said (787-8):

> "* * * Savings banks in this state are not permitted to owe any depositor more than the sum of $3,000 (Laws 1878, c. 347, §2;) and it appears by the report of the superintendent of the banking department that the average of these deposits on the first day of January, 1886, was $378 each. **These deposits represent mainly the savings of people of small means.** It is not probable that a twentieth part of the whole would be actually reached for taxation if they were not exempt. **Such accumulations tend to the extinction of pauperism, to the encouragement of economy, and to the general thrift and comfort of the masses of the people.** It is as much the part of a wise policy on the part of the state to encourage them as it is to encourage benevolent and charitable institutions. Such an exemption reduces the burden of taxation on other moneyed capital." (Emphasis supplied.)

This Court, in affirming the circuit court, noted that it did so for substantially the same reasons and in its opinion described the savings bank as being (121 U.S. 161):

> "* * * what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the state."

The Act which first authorized building and loan associations[58a] in Michigan (Act 50 of P. A. 1887), and which was typical nationally, contemplated an association in which there was no distinction between the savings and borrowing members. They were mutual in operation. Borrowers had to be subscribers to and investors in the capital stock of the association.

No one could participate in the benefits they afforded without becoming a shareholder. Individuals became investing members of these organizations in the expectation of ultimately becoming borrowing members as well. Membership implied not only regular payments to the association for a considerable period of time, but also risk of losses. Members could not cancel their memberships or withdraw their shares before maturity without incurring heavy penalties. The fact that the members were both the borrowers and the lenders was the essence of the 'mutuality'[59] of these organizations.

[58a]Since 1935 they have also been called savings and loan associations, Act 116, Public Acts 1935.

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[59]Such associations were truly **"mutual"** in the sense that both the borrowing and savings member shared equally in the gains or losses of the associations. Thus a borrowing member, whose loan was limited to the full value of his stock, shared in the profits of the association by receiving on his shares the same dividend paid nonborrowing members on their shares and, conversely, if the association failed he was liable not only for the amount unpaid on his shares, but also the mortgage on his property was subject to foreclosure to pay his debt without credit being given for amounts paid on his shares. *Russell v. Pierce* (1899), 121 Mich. 208; 80 NW 118; *Home Savings and Loan v. Mason* (1901) 127 Mich. 676; 87 NW 74.

A significant feature of the early association was the requirement that payments be on an installment basis payable periodically in an amount not to exceed $2.00 per share. (Sec. 6 of Act 50.) Fines could be levied for nonpayment of installments when due. The result was enforced thrift. As an example, the Saginaw [Michigan] Savings and Loan Association (whose charter, by-laws and all amendments thereto are contained in Exhibit 97) in its original bylaws (1888) provided for $100 par value stock to be paid for at the rate of 12½¢ weekly with a fine of 5¢ for delinquent weekly payments (Articles 12 and 15, R. 1205a; 1209a).

Loans were limited to those who had previously subscribed for the stock of the institution and no loan could be made a member in excess of the amount of his stock subscription. (Sec. 8 of Act 50.) **The operations of the association were confined to its membership and not open to the public.** Thus loans were the subject of competitive bidding restricted to the members at closed meetings held periodically. (Sec. 8 of Act 50) *Bechtel* v. *Saginaw Building & Loan Association,* 143 Mich. 599, 607-8; 107 NW 695.

The primary purpose of the early association was "... to encourage people of limited means to procure homes, and to make it possible for them to do so by advancing money to them to build their homes, secured by their stock [in the association] and real estate." *Myers* v. *Alpena Loan & Building Association* (1898), 117 Mich. 389, 392-3; 75 NW 944. Such an association could not be operated in the sole interest of the nonborrowing members at the expense of the borrower. *Myers* v. *Alpena Loan & Building Ass'n, supra.* The **investment in shares of corporations,** partnerships, pension funds or fiduciaries—which is common **today—was in the early**

days deemed inconsistent with the purpose of the Statute and prohibited. Report and Opinions of Attorney General, 1903, p. 58. There it was said (quoting 4 Endlich on Building Associations, 2nd Ed., p. 1028):

> "It certainly does not appear to be consistent with the purposes of a building association's being, nor in any wise related to, the policy which justifies the creation of these institutions with the extraordinary powers they possess, to have its membership in part composed of corporations, . . ."

Judge Taft, in 1899, described the early building and loan associations in *Mercantile Nat. Bank* v. *Hubbard*, 98 F. 465, 471 as follows:

> " * * * It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house."

The "just cause" or "just reason" language of the pre-1900 cases on which the Supreme Court of Michigan relies had to do with moneyed capital which (a) was not employed in competition with the then business of national banks and (b) was invested in associations, quasi-charitable in nature and operated for the benefit of "poor people."

The Modern Savings and Loan Association today is "a private corporation for profit" commercially, seeking business from all income classes of the general public and there is no "just reason" to partially exempt or to favor them taxwise.

The modern association bears no real resemblance to its early predecessor in scope or basic manner of operation. The name is the same and "many old **forms** have been preserved"; but "few of the associations have retained the **substance** of their earlier mutuality", *supra*, p. 23.

The modern shareholder is different from the shareholder of 1900.

In the first place, shareholders in the modern association are not comprised of "poor people."[60] Shareholders in the modern associations come from the public at large and every economic and income class.[61] Among present day investors are executives, professional people, business men, partnerships, corporations, pension funds, trustees, fiduciaries, scholarship funds, charitable organizations and churches, as well as individuals.[62]

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[60]After the completion of plaintiff's case, the Trial Court, in denying defendants' (appellees') motion to dismiss, was impelled by the proof to observe that savings and loan institutions had changed—**"at least the poor people angle is out of the picture."** (R. 669a)

[61]165a, 167a, 179a, 248a-249a, 294a, 345a, 375a, 426a; 1048-9a, 1172a.

[62]R. 177a-178a, 194a-195a, 208a-210a, 254a, 294a-295a, 346a, 414a, 434a, 495a; 1090a, 1138a, 11760.

It is obvious that corporations, partnerships, trustees, charitable organizations, churches and pension funds do not invest in shares of savings and loan associations with the view of bidding for mortgage loan moneys of the associations with which to build small homes for themselves—as did the "poor" shareholders of the early days. In fact, the sole interest of all shareholders today is to obtain the highest profit and dividend rate consistent with competition and safety (494a). The fact that his investment will be used to finance homes for others (or for any other purpose) is of no interest to him except only to the extent that it provides a safe and profitable use for his funds. See *infra*, pp. 74-76.

The advertising of the modern association is extensive and intensive, directed through mass communication media (radio, newspaper, television, direct mail) to **every one** (regardless of economic class or income and whether or not an individual or corporation) who has money to invest, i.e., **the general public.**[63] Shareholders are no longer limited to the neighborhood in which the association does its mortgage loan business, but are from the State at large, and even from the United States at large (R. 505a; 1083a; 1130a).

As testified to by one of the savings and loan witnesses, this type of investment is naturally made to a greater extent by the middle and upper income levels than the poorer people for the simple reason that they have larger resources available to invest (R. 1049).

The majority of the associations place no limit on the amount they will accept as an investment (R. 165a, 194a,

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[63] R.167a-169a, 194a, 198a. 293a, 339a, 375a, 424-a-425a; 1059a; 1144a.

294a; 1043a; 1171a). Rather, they welcomed as many and as large investments as they could obtain (R. 167a, 198a, 346a); although a few associations did place a maximum on the amount invested by a single shareholder (Eg., Saginaw Savings & Loan, $50,000 (R. 374a)).

At the end of fiscal year 1952, the Lansing Branch of the Capital Savings & Loan Association had 230 shareholders who invested over $3,713,000, averaging $16,146 per shareholder (R. 999a). The Calhoun Federal Savings and Loan Association of Battle Creek had 112 shareholders who invested over $1,501,418, or an average of $13,405, (R. 1020a). The eleven associations from whom information could be obtained (none of which were in Detroit, and some in comparatively small communities) had in excess of 1047 shareholders who invested $15,284,813, or an average holding of $14,598.[64]

The nature of the shareholders (e.g., corporations, partnerships, pension funds, trustees, some residing outside Michigan, etc. as well as individuals), the size of their shareholdings, and the manner of seeking investor-shareholders of all income and economic classes, clearly demonstrates that the modern associations are not comprised of "poor people . . . saving from their earnings, week by week, . . . an amount sufficient to pay their mortgage debt" to the association.

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[64] 991a, 993a, 994a, 997a, 999a, 1000a, 1006a, 1011a, 1015a, 1020a, 1165a.

Undoubtedly there were thousands of shareholders who had invested in and owned stock (in associations in the same cities where appellant operated) of between $5,000-$10,000 inclusive, but such data was not produced at the trial.

The modern borrower is different from the borrower of 1900.

Borrowers from the associations today are not "poor people" seeking to "build . . . small houses,"[65] but rather are drawn from the general public and are of the same income and economic classes[66] as are the residential mortgagor borrowers from appellant bank. The class of property mortgaged and the terms of the mortgages are similar. *Supra*, pp. 11-14.

The modern associations are no longer mutual.

There is today no greater "mutuality" (i.e., identity between borrower and investor in shares) in these associations than exists between borrowers and investors in shares in appellant bank.

In modern associations, an investor is not required to be a borrower,[67] and a borrower need not invest in shares.[68] In practice, only a very small percentage of borrowers from the association were actually investors in its shares (R. 327a, 494a, 509a). Nor is there any real community of interest between such shareholders and borrowers. This is materially

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[65]Most associations during 1952 made loans in a substantial amount on the security of residential real estate for **purposes other than home purchases** such as for the purchase of automobiles, the payment of medical expenses and funeral expenses, investments and vacations (R. 276a, 292a, 348a, 383-384a, 419a, 429a).

Occasionally the associations also made loans secured by mortgages on commercial property (R. 1138-9a (for a supermarket, $62,500), 1139a, 324a, 351a).

[66]Executives, business and professional people, teachers, builders, as well as wage earners.

[67]R. 166a, 168a, 200a, 251a, 342a, 427a, 490a, 885a.

[68]R. 166a, 168a, 200a, 251a, 296a, 342a, 375a, 389a, 427a, 490, 885a.

different from the early associations where "individuals became investing members . . . in the expectation of ultimately becoming borrowing members, as well," *supra*, p. 23. **Today,** the interest of the investor and of the borrower is diametrically opposed. Borrowers are interested exclusively in obtaining the best mortgage loan terms available; whereas, the associations and their shareholders seek to get the best return on their investment consistent with sound business practices.[69] Prosperity of the associations is reflected in increased dividends or undivided profits in which only the investors share, and not in any reduction in interest rate by which the borrower might benefit.

In the early associations "membership" was an economic reality, common to both shareholders and borrowers. **Today, only investors are truly members** and shareholders. **A borrower's membership is only a sham**—a resort to old **form,** completely **lacking substance.**

An investor, by the act of investing in the association becomes a shareholder and a member (R. 276a). As a shareholder, and necessarily therefore as a member, he has certain important legal rights. He has a right to share in the earnings [or losses] of the association;[70] the right to share in the association reserves in the event of liquidation (R. 1058a); the right to assign his shares[71] and the right to vote his shares [with some limitations] for the selection of association management.[72] He, in fact, has a true legal and economic interest in the association.

Unlike the borrower from the early type of association, today's borrower need not be a member when he applies for

[69]R. 330a, 343a, 344a, 437a, 467a, 494a, 495a.

[70]R. 164a, 166a, 194a, 245a, 295a, 372a, 426a.

[71]215a, 262a, 303a, 325a, 340a, 399a, 1147a, 1183a.

[72]165a, 195a, 326a, 346a, 374a, 507a, 1050a, 1119a.

the loan, nor need he subscribe to or invest in the association's shares after the loan is consummated. His "membership," of which he is probably unaware, is simply a technical compliance with the statute. If his credit and security meet the loan requirements of the association, membership embraces him upon obtaining his loan.[73] Having become a member, the borrower's only rights or obligations are his right to one vote and his obligation to repay his loan.[74] His membership ceases upon repayment of his loan (R. 510a, 1179a). Consequently, the borrower from the modern association unlike his predecessor, neither shares in the profits nor assumes any loss resulting from the association's operations. The borrower today finds the association no different than any other mortgage lending institution, including appellant bank (R. 899a). Certainly this barren grant to a borrower of one vote and his obligation to repay his debt creates no "mutuality" or community of interest (as that term was understood in the earlier cases) between him and the investing shareholders.

The only "mutuality" that exists in the modern associations is that among the investing shareholders, who band together to obtain the highest dividends, consistent with safety. In this respect, Professor Woodworth admitted that **the associations are no more "mutual" than is appellant bank** (R. 901a).

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[73] R. 175a, 201a, 208a, 308a, 342-3a, 1052a, 1179a.

[74] R. 173a, 174a, 208a, 460-1a, 491a, 510a, 1050a.

Law changed in 1935 to eliminate requirement that borrower be an investor in stock.

Act 50 (P.A. of 1887, Michigan) Sec. 8 provided that no borrower could bid for a loan (a) unless he was a stockholder and (b) not "in excess of amount of stock held."

Act 116 (P.A. of 1935, Michigan) amended Sec. 8 of Act 50, eliminating both limitations. A borrower now need not become an investor in shares—he becomes only a "member," with no investment, and no participation in profits or losses, as do investor shareholders.

Compare pp. 68-69 and cases cited in footnote 59, and *Phelps v. Savings and Loan Assn.*, 121 Mich. 343, 354; 80 N.W. 120 and *Building Loan Assn. v. Price*, 169 U.S. 45, 54; 42 L. Ed. 655.

Modern savings and loan associations employ moneyed capital in the same way modern national banks employ a large and substantial part of their capital.

The modern savings and loan associations in recent years do no more to encourage thrift or home ownership than do national banks.

The modern national banks (including appellant), through their savings departments, as actively encourage thrift by the same general public as do the savings and loan associations; and, through their mortgage departments, as actively promote home ownership by the same general public as do the savings and loan associations.[75]

Michigan no longer exempts from taxation savings and loan associations or their shares.

The character of Michigan savings and loan associations having changed from 1887 (when they were exempt from taxation) (Act 50 P.A. of 1887; M.S.A. 23.558), Michigan now taxes savings and loan associations and their shares, see *supra*, p. 22. Recognizing that such associations are no longer mutual in character, that investors are interested solely in high return and that borrowers are interested solely in obtaining the best terms—each independent of the other—Congress in 1951 removed the tax-exempt status from these associations, see *supra*, p. 22. The reason for exemption no longer obtains.

The Hoenig case is not in point.

Appellee and the lower court rely upon *Hoenig* v. *Huntington National Bank*, 59 Fed. (2d) 479, cert. denied, 287 U. S.

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[75]In fact, appellant bank which had a greater volume of F.H.A. and V.A. mortgages, with lower interest rates, longer terms, and smaller down payment, thus helped the cause of home ownership more than savings and loan associations, which were seeking higher returns and faster amortization. (R. 872-4a; 432a; 512-3a; 1152a; see *supra*, p. 12.)

648. However, *Hoenig*, decided by a sharply divided court, is clearly distinguishable.

In 1926-7 (the tax years involved in *Hoenig*), national banks were then prohibited by law from taking a residential mortgage for a term in excess of one year. The record in *Hoenig* shows that only 7/10 of 1% of the plaintiff banks' loaning business in Columbus, Ohio, consisted of real estate mortgage loans, and even that minute percentage was for one year or less, compared to the savings and loan associations' mortgages of 10 to 12½ years. Every banker in that case was obliged to admit on cross-examination that:

"We have no direct loans on homes" (Archer);
"We do not fill that demand" (Huntington);
"As a rule we do not cater to them" (Stein).

(See Appendix C, *infra.*)

With respect to the 10 to 12½ year loans made by the associations, the Court of Appeals in *Hoenig* held that **national banks "do not and . . . should not invest their funds generally in this manner"** (59 F. 2d 482).

In contrast, in the instant case, about 40% of appellant bank's entire loan business are residential mortgage loans with substantially the same terms as those of the associations.[76] See chart comparing competition in the case at bar with *Hoenig*, Appendix C.

Hoenig was properly decided **on its facts,** and certiorari was properly denied for the same reason which the Court recognized in *Shreveport, supra,* i.e. **lack of factual competition.**

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[76]Commencing in 1934 Congress by a series of statutes further extensively and substantially broadened the powers of national banks to loan on residential mortgages, so that in 1952 and today, there is practical identity in the power of national banks and savings and loan associations to engage in the business of mortgage loans. (For a history and description of this legislation broadening the power of national banks in the mortgage loan field, see *supra,* pp. 18-20.)

In *Hoenig* the court also found, as a fact, that the associations were like those described in *Mercantile National Bank* v. *Hubbard, supra,* saying (59 Fed. (2d) 482):

> "The chief purpose of these institutions is still 'to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house.' *Mercantile National Bank* v. *Hubbard, supra* . . ."

and recognized that savings and loan associations were "created in answer to a need which the banks could not and did not satisfy . . ." (482).

Contrary to *Hoenig*, the facts in the case at bar undisputedly show that the savings and loan associations of 1952 and today are not institutions of "poor people . . . saving week by week . . . to pay mortgage debts"—serving "a need which banks could not and did not satisfy." Today, these institutions deal with the general public, **operate commercially for profit,** are in sharp competition with the business of national banks, *supra,* pp. 9-17.

The ascendant growth of savings and loan associations and dominant position in residential mortgage business.

Savings and loan associations have enjoyed an astonishing growth.[77] Today, they are large, powerful financial institu-

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[77]Norman Strunk, executive vice-president of the United States Savings and Loan League, at the Annual Conference of the American Savings and Loan Institute at Chicago in March, 1960, predicted that by 1970 the assets of the business would be approximately $165 billion as compared to $65 billion at present, that savings and loan associations would be doing 55 per cent of all home financing as compared to 40 per cent today, and that several associations would be billion dollar institutions.

Moreover, Mr. Strunk in a forewarning to banks stated that "bank stockholders would be better served if the banks were to stop trying to attract savings deposits . . ."

tions which should in all fairness bear their equal share of taxation and cost of government.

To illustrate their present size and strength, more than one (1) out of every three (3) mortgages on every class of residential real estate made in Michigan and in the United States in 1952 was made by such associations, and this ratio has steadily increased to over 40% at the present time.

The associations' growth picture has been spectacular. In 1900, all associations in the United States had total assets of only $571,367,000 (Exhibit 221, R. 1284a). By 1952, their assets had grown to $19,200,000,000. In 1900, total assets of all Michigan associations equalled only $10,118,000. By 1952, total assets had increased to $537,695,000 (Exhibit 221, R. 1284a), which figure almost equalled the total assets of all associations in the United States in 1900. At the end of 1959, the size of these financial institutions had reached the startling figure of $63,472,000,000 in the United States, and $1,679,000,000 in Michigan.

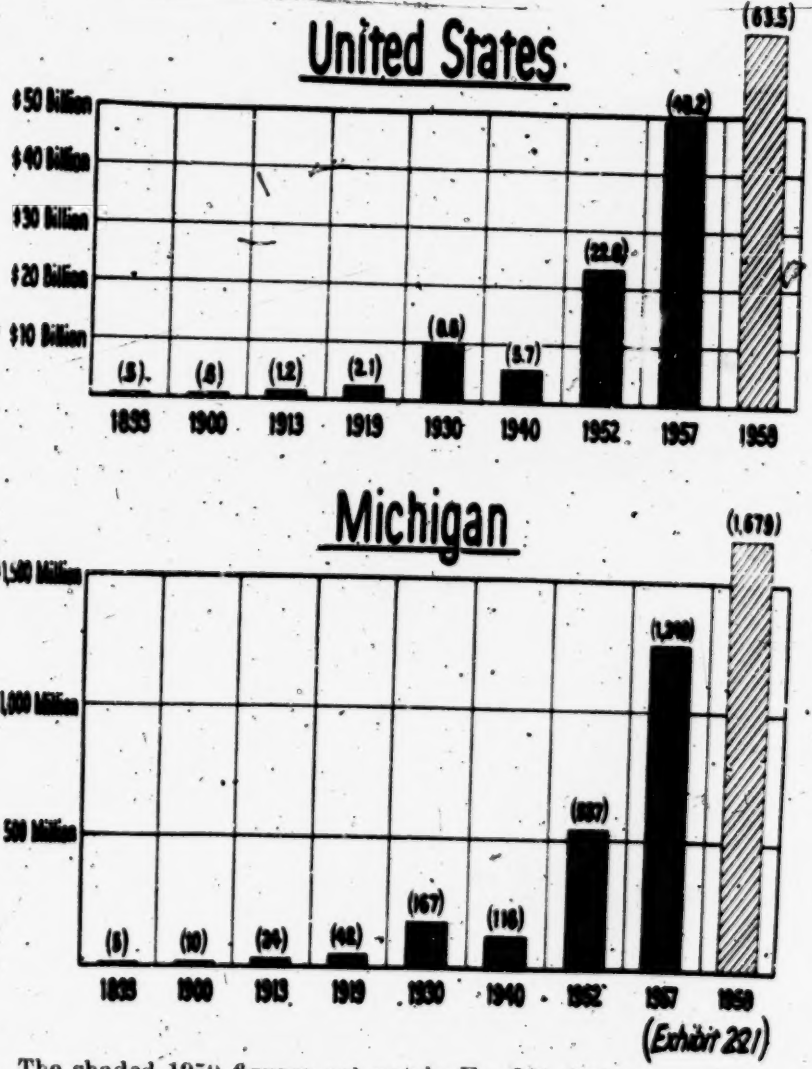
Savings and loan associations with share capital in excess of $100,000,000 are not uncommon; in 1959, there were 71 such associations in the United States. There were 10 associations having share capital in excess of $300,000,000. See Table 52, Savings and Loan Fact Book, 1960, p. 74: Source Federal Home Loan Bank Board.

In 1922 the average total assets of savings and loan associations was $330,000 in 1952:—$3,200,000 in 1956;—$6,900,000 (Exhibit 14; R. 972a):—$10,100,000 in 1959 (Fact Book, 1960, p. 74).

The growth of savings and loan associations—particularly since 1940—is illustrated by the following chart.

Growth of Savings & Loan Associations

Assets



(Exhibit 221)

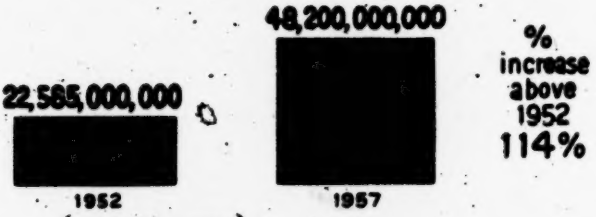
The shaded 1959 figures are not in Ex. 221, but appear in the monthly report of Federal Home Loan Bank Board.

Moreover, the growth of savings and loan associations in the United States from 1952 to 1957 (114%) has outstripped the growth of national banks (3%) during the same period. Stated in another way, the asset growth of savings and loan associations during that period was approximately $25,600,000,000, as compared with the increase in assets of national banks of only about $3,300,000,000, or about 8 to 1. See following chart.

Growth of Savings & Loan Associations Compared to National Banks—United States

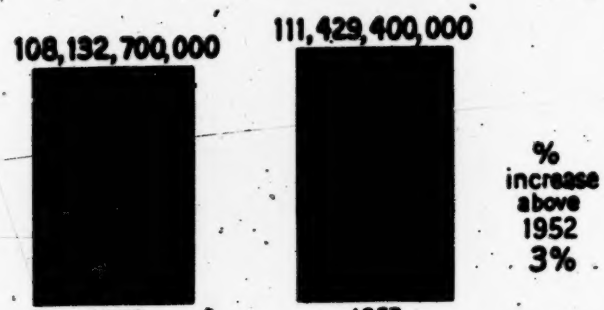
—Assets—

All Savings & Loan Associations



(Exhibit 221)

All National Banks



(Exhibit 219)

The Highest Banking Official of the United States Government, the Comptroller of Currency, fully recognizes and is concerned about the increasing importance of savings and loan associations' competition with banks.

Considering the extent of competition faced by banks, the Comptroller of Currency of the United States recently testified before Congress:[78]

> ". . . banks are finding themselves more and more in competition with other types of bank and nonbank financial institutions . . . competing with commercial banks are . . . **Federal and State chartered savings and loan associations . . .**"

Referring to the statement of his Deputy Comptroller:[79]

> **"Federal and State-chartered savings and loan associations are zealous and highly effective competitors for the funds of savers and for real estate mortgage loans . . .**

the Comptroller concluded:

> "It is our view that **any failure to take into consideration competition from other types of financial institutions** when considering the subject of **bank competition** would **indicate serious lack of knowledge of basic factors important to banking today** and disregard of the elements that go into a determination of the competitive situation in which commercial banks function."

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[78]Hearings before Subcommittee No. 2 of the Committee on Banking and Currency, House of Representatives, Eighty-Sixth Congress, Second Session, on S. 1062—February 16, 17, and 18, 1960, p. 7.

[79]The Comptroller placed into the record an address of L. A. Jennings, Deputy Comptroller of Currency, of May 27, 1959, on the subject of "Competition in Commercial Banking," (see also Congressional Record of June 18, 1959).

The serious effect of discrimination against national bank shares.

This Court has consistently held that R. S. 5219 demands equality of taxation and "that every clear discrimination against national bank shares [as has been demonstrated here] . . . is a violation of both the letter and spirit of the restriction." *Anderson, supra,* 269 U.S. at p. 248.

The adverse effect of such a discrimination upon the business of national banks and their shares is obvious and is implicit in the statute. As was said in *Mercantile, supra:* "A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden." (121 U. S. 138, 155.)

The more a taxing authority prefers savings and loan associations, the greater the margin of profit they enjoy over national banks in the competing area of residential mortgages. This alone is seriously detrimental to national banks and their shareholders.

Furthermore, the more profit advantage the associations thus enjoy, the greater dividends they are enabled to pay to their shareholders. As a result, they have successfully attracted increasingly greater investments of surplus funds, which might otherwise have been invested in national bank shares or deposited with national banks[80] for its use in the

[80]Savings deposits constitute the "life blood" of thousands of individual commercial banks. Indeed, at mid-1959 there were 3,185 insured commercial banks holding savings deposits varying from 50 to 100 percent of their total deposits. Another 4,888 insured commercial banks had from 30 to 50 per cent of total deposits in savings and time deposits. In other words, over 8,000 insured commercial banks, or more than three-fifths of the total number

(Continued on next page)

mortgage business. With these increasing amounts of moneyed capital (favored taxwise) thus obtained, the associations have had increasing resources to use in the competing residential mortgage loan business, while the national banks—competing at a disadvantage in the mortgage loan business—also lose in resources which they could employ in the residential mortgage business and lose in earnings, which adversely affect the value of their shares.

There is no just cause for a state to "partially exempt"—prefer taxwise—moneyed capital invested in shares of savings and loan associations.

To favor savings and loan associations and their shareholders taxwise in the light of their ascendant growth and dominant position in the residential mortgage loan business is indefensible under R. S. 5219. No longer a small, poor man's institution with limited resources—but huge, powerful organizations aggressively competing for profit with important segments of the business of national banks—there is no just or valid reason why they should be exempted or favored.

R. S. 5219 does not prevent the states from taxing shares of national banks. It only provides that if such shares be taxed by the state, the tax must be on a basis of equality with other competing moneyed capital. The state does not suffer by this requirement. In the instant case, the state revenues would be increased if the present tax rate on national bank shares were maintained and the moneyed capital invested in associations were similarly treated—in which event, at least

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(Continued from page 84)

are particularly dependent upon savings deposits for continued successful operation. Further, the large majority of these banks are of small size, with about 6,500 holding less than $10 million in total deposits. See Federal Deposit Insurance Corporation Annual Report 1959, Table 19, p. 50.

6 million dollars more taxes each year would be paid to the State of Michigan—which now escape.

Historical labels—no longer apposite in modern day society and economy—certainly should not determine basic principles. Statements about associations of a different era should not be blindly applied under the completely different economic facts of today. An 1890 association is not a 1952 association.

As the late Justice Cardozo said in his treatise, "Nature of the Judicial Process" (page 81):

> "Courts know today that statutes are to be viewed, not in isolation or *in vacua* * * * but in the setting and the framework of present-day conditions * * *."[81]

Tax equality is the injunction of R. S. 5219. Under the compelling facts in this case, we submit that this Court should not permit the statutory safeguard against discrimination to be undermined or whittled away.

Continued tax discrimination against shares of national banks must inevitably result in a weakening and corrosion of the structure and operation of the national banking system.

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[81]Citing: *Muller* v. *Oregon*, 208 U. S. 412; Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 225; Pound, "Scope and Progress of Sociological Jurisprudence," 25 Harvard L. R. 513; cf. Brandeis, J., in *Adams v. Tanner*, 244 U. S. 590 [616]. See also *Holden v. Hardy*, 169 U. S. 366, 387.

See Oliver Wendell Holmes, "Collected Legal Papers," p. 187.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed, and that such Court be directed to enter judgment for appellant.

Respectfully submitted,

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MICHIGAN NATIONAL BANK

November 18, 1960

APPENDIX A

(R. S. 5219)

United States Code, Title 12

NATIONAL BANK SHARES

§548. State taxation.

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with;

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corpora-

tions doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R.S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223.)

APPENDIX B

Act No. 9, Public Acts of 1953

An act to amend section 2a of Act No. 301 of the Public Acts of 1939, entitled as amended "An act to provide for the imposition and the collection of a specific tax upon the privilege of ownership of intangible personal property; to provide for the disposition of the proceeds thereof; to prescribe the powers and duties of the department of revenue with respect thereto; to prescribe penalties; to make an appropriation to carry out the provisions of this act; and to repeal all acts and parts of acts inconsistent with the provisions of this act," as added by Act No. 182 of the Public Acts of 1952, being section 205.132a of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section amended.

Section 1. Section 2a of Act No. 301 of the Public Acts of 1939, as added by Act No. 182 of the Public Acts of 1952, being section 205.132a of the Compiled Laws of 1948, is hereby amended to read as follows:

205.132a. Intangibles tax; stock of banks and trust companies; capital account definition; date of payment of tax. [M.S.A. 7.556 (2a)]

Sec. 2a. For the calendar year 1952, in lieu of the tax imposed by this section prior to this amendatory act, and for each year thereafter, or a portion thereof, there is hereby levied upon each resident or nonresident owner of shares of stock of national banking associations located in this state and banks and trust companies organized under the laws of this state, and there shall be collected from each such owner an annual specific tax on the privilege of ownership of each such share of stock, whether or not it is income producing, equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association, bank or

trust company represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share. "Capital account" as referred to herein shall be determined by adding the common capital, surplus and undivided profits accounts exactly as they appear on the report as of the latest date during the year for which the tax is imposed prepared by such association, bank or trust company for the public authority having general regulatory supervision over it, and the dollar amount of the capital account represented by each share of its common stock shall be determined by dividing such capital account by the number of shares of such common stock outstanding at the date of such report. The tax on such shares of stock levied under this section shall be the only tax levied with respect to shares of such associations, banks or trust companies.

The tax imposed by the provisions of this section 2a for the calendar year 1952 shall be due and payable on or before 45 days after the effective date of this section 2a and that so imposed for each year thereafter shall be due and payable as provided for in section 4 of this act.

Notwithstanding anything to the contrary contained in any other provision of this act, the amount of all taxes paid by any such association, bank or trust company on behalf of its shareholders for the calendar year 1952 in accordance with any provision or provisions of this act in effect prior to the effective date of this section 2a shall be credited as a payment against the tax imposed on the shares of such association, bank or trust company for the calendar year 1952 under this section 2a.

This act is ordered to take immediate effect.

Approved March 25, 1953.

APPENDIX C

Hoenig Extracts

Testimony of Bankers on Cross-Examination.

Cross-examination of Baldwin Gwinn Huntington (Vice-President of Huntington National Bank), p. 240:

> "It is true, surely, that there is a great demand for long time loans. **We do not fill that demand, and are not permitted to fill that demand;** but the fact that there is some one who does not make them any the less in competition to us. We can not take a twelve year mortgage on real estate in Columbus. Even if we took a real estate mortgage for one year under the Federal Reserve Act, Section 24, we would be limited to sixty per cent on mortgages."

Cross-examination of Frank L. Stein (President, Ohio National Bank), p. 251:

> "It is true that the Ohio National Bank does not make a practice of giving a ten year mortgage direct to a person who comes in and says, 'I want to buy a home and want to pay for it on the monthly payment plan, the way I can get it of the building and loan.' **It is true that on June 30, 1926, we did not have any loans of that kind except for debts that had been previously contracted.** If a prospective borrower should come into the Ohio National Bank owning a $10,000 piece of property in Columbus as of June 30, 1926, and should say, 'I want to borrow $5,000 on my $10,000 piece of property. I will execute a note payable to the Ohio National Bank at the rate of one dollar per hundred per month, which would make the loan extend for a period of twelve years and nine months.' Whether or not the bank would accept such a loan as that would depend upon the party making the application. **As a rule, we do not cater to them. As of June 30, 1926, we could not legally have made such a loan, and such a loan as that would not normally be a popular loan for a bank.** I know there is a large demand

in Columbus for loans of that character. It is a fact of common knowledge that the average purchaser of a house, in rather moderate circumstances, buys his home on that basis."

Cross examination of George A. Archer (President of Commercial National Bank), pp. 218, 220:

"We make loans on real estate in our bank, but we have not gone into the real estate work to any extent.
* * *

"We have very few direct to the bank mortgages. These are very small. I think the largest is about $30,000.
* * *

"When I stated on direct examination that the largest real estate loan we had was thirty thousand dollars, I had in mind a loan on a four-story building of brick on South High Street. This loan was taken to secure a debt, and was not originally made as a mortgage loan. When I looked at the papers, I found that we have one larger than that—$75,000 on business property up in the north end. This was a direct loan. **We have no direct loans on homes."**

"Hoenig" Facts

Total Loans of all National Banks in Columbus, Ohio Including Plaintiff's	Total Loans of all building and loan associations in Columbus, Ohio
$56,133,000 (Hoenig record, p. 36)	$90,544,234 (Hoenig record, p. 38)

Total Residential Mortgage Loans	Total Residential Mortgage Loans
$399,000 (Hoenig record, p. 36)	$89,797,515 (Hoenig record, pp. 38, 39)

Average Term of Residential Mortgage Loans	Average Term of Residential Mortgage Loans
1 year maximum term (12 U.S.C. 371) No testimony as to average term	10½ to 12½ yrs. (Hoenig record, p. 39)

% of Residential Mortgage Loans to Total Loans
7/10 of 1%

Facts in This Cause

Total Loans of Plaintiff Bank in 7 Cities	Total Loans of all savings and loan associations in 7 Cities
$148,304,387 (Exh. 3)	$97,584,865 (Appellant's Jurisdictional Statement, p. 13)

Total Residential Mortgage Loans	Total Residential Mortgage Loans
$59,737,315 (Exh. 3) (Including $8,317,457 home improvement loans.)	$97,584,865* (Appellant's Brief, p. 17)

Average Term of Residential Mortgage Loans	Average Term of Residential Mortgage Loans
Conventional—10 yrs. FHA, VA } 20-25 yrs. (Appellant's Brief, pp. 12-14)	Conv.—11-12 yrs. FHA, VA } 20-25 yrs. (Appellant's Brief, pp. 12-14)

% of Residential Mortgage Loans to Total Loans
40%

*Virtually all loans were secured by residential real estate, although some commercial loans were made.